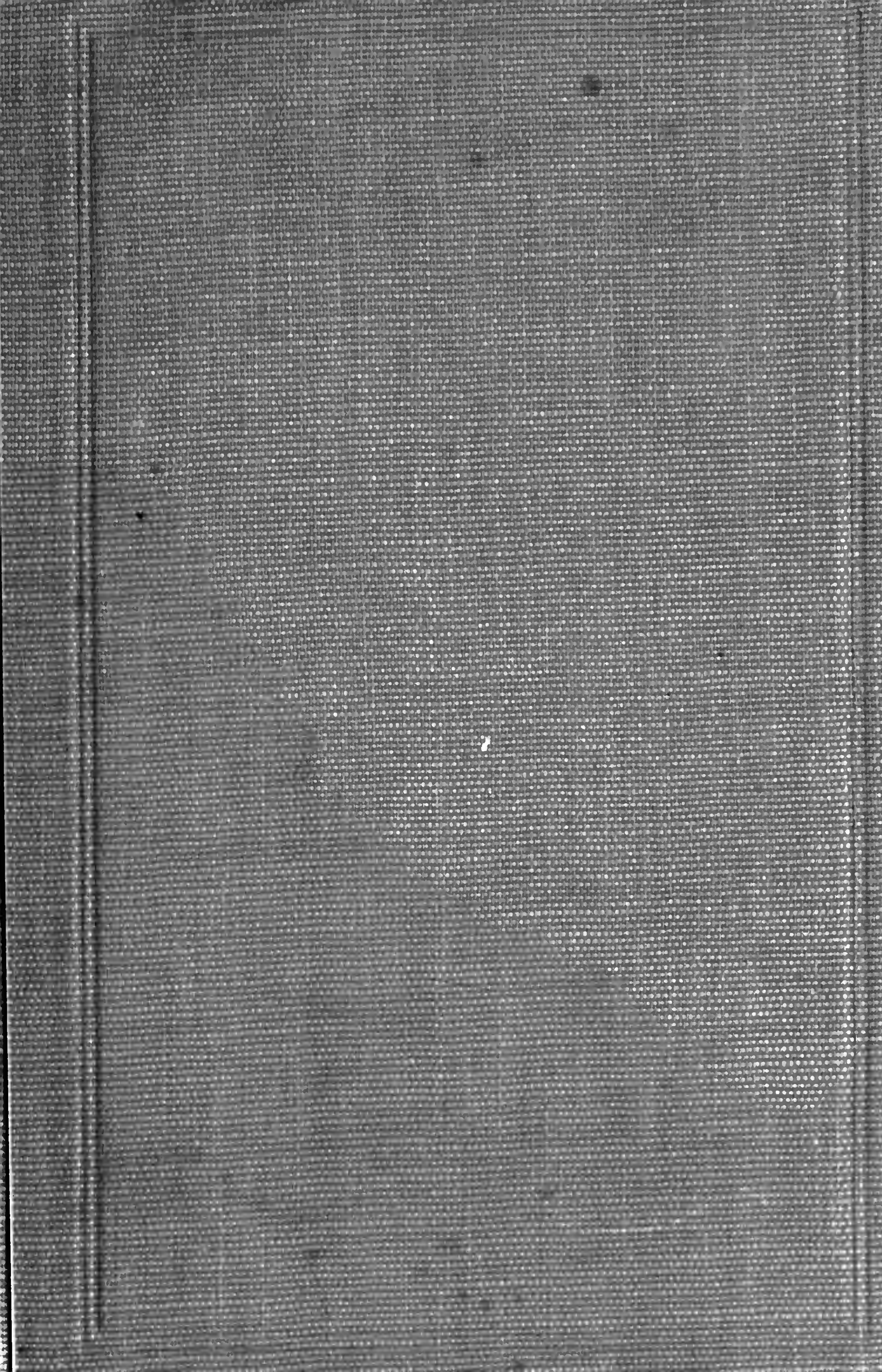

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UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Plaintiffs in Error,

v.

UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

FILED
MAR 27 1919
F. D. MONCKTON,
CLERK.

Clement G. Vincent — Law Printer — 314½ W. 2nd St., Los Angeles, Cal. — 14317.

No. ....

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Names and Addresses of Attorneys.

For Plaintiffs in Error:

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CHAIM SHAPIRO, Esq., 714 American Bank Building, Second and Spring Streets, Los Angeles, California.

For Defendant in Error:

J. R. O'CONNOR, Esq., United States Attorney, Los Angeles, California.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Plaintiffs in Error,

v.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error

The United States of America,—ss.

The President of the United States of America, to

the Judges of the District Court of the United States, in and for the Southern District of California, Southern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Benjamin F. Bledsoe, one of you, between the United States of America, plaintiff and defendant in error, and Ricardo Flores Magon and Librado Rivera, defendants, and said Ricardo Flores Magon and Librado Rivera, plaintiffs in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by complaint doth appear, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the

United States, this seventh day of December, 1918.

CHAS. N. WILLIAMS,

Clerk of the District Court of the United States for the District of California.

[Seal] By R. S. ZIMMERMAN,

Deputy Clerk.

The foregoing writ of error is hereby allowed.

BLEDSOE,

District Judge.

I hereby certify that a copy of the within writ of error was on the 2nd day of January, 1919, lodged in the clerk's office of said United States District Court for the Southern District of California, Southern Division, for the said defendants in error.

CHAS. N. WILLIAMS,

Clerk United States District Court, Southern District of California.

[Seal] By MURRAY C. WHITE,

Deputy Clerk.

[Endorsed]: No. 1421—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. Ricardo Flores Magon and Librado Rivera, Plaintiffs in Error, v. United States of America, Defendant in Error. Writ of Error. Filed Dec. 28, 1918. Chas. N. Williams, Clerk By R. S. Zimmerman, Deputy Clerk. J. H. Ryckman, Chaim Shapiro, S. G. Pandit, Attys. for Plaintiffs in Error. J. H. Ryckman, Lawyer, Suite 921, Higgins Building, Second and Main Sts., Los Angeles, California. 62741.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Plaintiffs in Error,

v.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation to Writ of Error

To the United States of America, Defendant in Error and to Robert O'Connor, its attorney:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco in said Circuit, on the 26th day of January, A.D. 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein Ricardo Flores Magon and Librado Rivera are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at Los Angeles, in said District, this 28th day of December, 1918.

BLEDSOE,

Judge.

Service of the within citation is hereby accepted at Los Angeles, California, this 2nd day of January, 1919.

T. F. GREEN,

Asst. U. S. Attorney for Southern District of California.

[Endorsed]: No. 1421—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. Ricardo Flores Magon and Librado Rivera, Plaintiffs in Error, v. United States of America, Defendant in Error. Citation to Writ of Error. Filed Jan. 2, 1919. Chas. N. Williams, Clerk. Murray C. White, Deputy. J. H. Ryckman, Chaim Shapiro, S. G. Pandit, Attys. for Plaintiffs in Error. J. H. Ryckman, Lawyer, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California. 62741.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

At a stated term of said Court begun and holden at the City of Los Angeles, County of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and eighteen.

The Grand Jurors of the United States of America, chosen, selected and sworn within and for the Division and District aforesaid, on their oath present:

That Ricardo Flores Magon and Librado Rivera, whose full and true names are, and the full and true name of each is, other than as herein stated to the Grand Jurors unknown, each late of the Southern District of California, heretofore, to-wit: on or about the 1st day of March, 1918, at the city of Los Angeles, within the State and Southern Division of the Southern District of California, did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to violate the laws of the United States of America, to-wit: to violate Section 3 of Title I, and section 3 of Title XII of the Act of Congress approved June 15, 1917, and commonly known as the Espionage Act, Section 19 of the Act of Congress approved October 6, 1917, commonly known as the Trading with the Enemy Act, and section 211 of the Federal Penal Code of 1910, as amended, which said conspiracy was substantially as follows, to-wit: that they, the said Ricardo Flores Magon and Librado Rivera would write and cause to be written and published and cause to be published, an article containing false reports and false statements which would tend to interfere with the operation and success of the military and naval forces of the United States, promote the success of its enemies, cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and would obstruct the recruiting and enlistment service of the United States, and which said article would be printed and caused to be printed, published and

caused to be published and circulated and caused to be circulated in a foreign language, to-wit: The Spanish language, without first filing an English translation thereof with the post master of the City of Los Angeles, as required by law, and which said article they would publish and cause to be published in a newspaper called "Regeneracion" and which said article so published they would deposit and cause to be deposited in the post office establishment of the United States for mailing and delivery by means of the said post office establishment, and defendants intended that the said article would then and there be indecent, and contain indecent matter and language;

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the object thereof, the said Ricardo Flores Magon and Librado Rivera did, on or about the 16th day of March, 1918, publish and cause to be published in said newspaper so known as "Regeneracion", a certain manifesto, in words and figures as follows, to-wit:

MANIFESTO

La Junta Organizadora del Partido Liberal Mexicano.

A los miembros del partido, a los anarquistas de todo el mundo y a los trabajadores en general.

Companeros:

El reloj de la Historia está próximo a señalar con su aguja inexorable el instante en que ha de producirse la muerte de esta sociedad que agoniza.

La muerte de la vieja sociedad está próxima, no

tarda en ocurrir, y sólo podrán negar este hecho, aquellos a quienes interesa que viva, aquellos que se aprovechan de la injusticia en que está basada, aquellos que ven con horror la Revolución Social, porque saben que al día siguiente de ella, tendrán que trabajar codo con codo con sus esclavos de la víspera.

Todo indica, con fuerza de evidencia, que la muerte de la sociedad burguesa no tarda en sobrenir. El ciudadano ve con torva mirada al polizonte, a quien todavía ayer consideraba su protector y su apoyo; el lector asiduo de la prensa burguesa encoje los hombros y deja caer con desprecio la hoja prostituida en que aparecen las declàraciones de los jefes de Estado; el trabajador se pone en huelga sin importarle que con su actitud se perjudiquen los patrios intereses; consciente ya de que la patria no es su propiedad, sino la propiedad del rico; en la calle se ven rostros que a las claras delatan la tormenta, interior del descontento, y hay brazos que parece que se agitan para construir la barricada; se murmura en la cantina; se murmura en el teatro; se murmura en el tranvía, y en cada hogar, especialmente en nuestros hogares, en los hogares de los de abajo, se lamenta la partida de un hijo a la guerra o los corazones se oprimen y los ojos se humedecen al pensar que mañana, que tal vez hoy mismo, el mocetón que es la alegría del tugurio, el joven que con su frescura y su gracia envuelve en resplandores de aurora la triste existencia de los padres que los están en su ocaso, será arrancado del seno amoroso de la familia, para ir a enfrentarlo, arma al brazo,

con otro joven que es como él e encanto de su hogar, y a quien no odia, y a quien no puede odiar porque ni siquiera le conoce.

Las flamas del descontento se avivan al soplo de la tirania cada vez más ensoberbecida y cruel en todo país y aquí y allí, allá y acullá y en todas partes, los puños se crispan, las mentes se exaltan, los corazones laten con violencia, y donde no se murmura, se grita, suspirando todos por el momento en que las manos encallecidas en cien siglos de labor, deban dejar caer la herramienta fecunda, para levantar el rifle que espera nervioso la caricia del héroe.

Compañeros: el momento es solemne; es el momento precursor de la más grandiosa catastrofe política y social que la Historia registra; la insurrección de todos los pueblos contra las condiciones existentes.

Va a ser, seguramente, un impulso ciego de las masas que sufren; va a ser, a no dudarlo, la explosión desordenada de la cólera comprimida apenas por el revólver del esbirro y la horca del verdugo; va a ser el desbordamiento de todas las indignaciones y de todas las amarguras, y va a producirse el caos, el caos propicio al medro de todos los pescadores a río revuelto; caos del que pueden surgir nuevas opresiones y tiranias nuevas, porque en esos casos, regularmente, el charlatán es el leader.

Toca, pues, a nosotros, los conscientes, preparar la mentalidad popular para cuando llegue el momento, ya que no preparar la insurrección, porque la insurrección nace de la tiranía.

Preparar al pueblo no sólo para que espere con

serenidad los grandiosos acontecimientos que vislumbramos, sino para que sea capaz de no dejarse arrastrar por los que quieran conducirlo, ahora por camino de flores, a idéntica esclavitud o a tiranía semejante a la que hoy sufrimos.

Para lograr que la rebeldía inconsciente no forje con sus propios brazos la cadena nueva que de nuevo ha de esclavizar al pueblo es preciso que nosotros, todos los que no creemos en gobierno, todos los que estamos convencidos de que gobierno, cualquiera que sea su forma y quienquieraque se encuentre al frente de él, es tiranía, porque no es una institución creada para protejer al débil, sino para amparar al fuerte, nos coloquemos a la altura de las circunstancias y sin temor propaguemos nuestro santo ideal anarquista, el único humano, el único justo, el único verdadero.

No hacerlo, es traicionar a sabiendas las vagas aspiraciones de los pueblos a una libertad sin límites, como no sean los límites naturales, esto es, una libertad que no dañe a la conservación de la especie.

No hacerlo, es dejar manos libres a todos aquellos que quieran aprovechar para fines meramente personales el sacrificio de los humildes.

No hacerlo, es afirmar lo que dicen nuestros contrarios, que está muy lejano el tiempo en que pueda implantarse nuestro ideal.

Actividad, actividad y más actividad, eso es lo que reclama el momento.

Que cada hombre y cada mujer que amen el ideal anarquista, lo propaguen con tesón, con terquedad,

sin hacer aprecio de burlas, sin medir peligros, sin reparar en consecuencias.

Manos a la obra camaradas y el porvenir será para nuestro ideal.

TIERRA Y LIBERTAD.

Dado en Los Angeles, Estado de California, Estados Unidos de América, el dia 6 de Marzo de 1918.

RICARDO FLORES MAGON
LIBRADO RIVERA

Nota: — Contestaciones a esta Manifiesto, remitanse a Ricardo Flores Magón, P.O. Box 1236, Los Angeles, Cal., U.S.A.

A true and correct translation of said manifesto is as follows, to-wit:

MANIFESTO

The Assembly of Organization of the Mexican Liberal Party.

To the members of the party, the Anarchists of the whole world and the Workingmen in general.

COMPANIONS: The Clock of History will soon point with its hands inexorable the instant producing death to this society already agonizing.

The death of the old society is close at hand, it will not delay much longer and only those will deny the fact whom its continuation interests; those that profit by the injustice in which it is based, those that see with horror the approach of the Revolution for they know, that on the following day they will have to work side by side with their former slaves.

Everything indicates, with force of evidence that the death of the burgoisie society will come unex-

pectedly. The citizen with grim gaze looks at the Policeman whom only yesterday he considered his protector and support; the assiduous reader of the burgoisie Press shruggs the shoulders and drops with contempt the prostituted sheet in which appear the declarations of the Chiefs of State; the workingman goes on strike, not taking into account that by his action he injures the country's interest, conscious now that the country is not his property but is the property of the rich; in the street are seen faces which clearly show the interior torment of discontent, and there are arms that appear agitated to construct barricades; murmurs in the saloons, in the theatres, in the street cars, in each home, especially in our homes, in the homes of those below where is mourned the departure of a son called to the war, or hearts oppressed and eyes moistened when thinking that tomorrow, perhaps today even, the boy who is the joy of the hut, the youngster who with his frankness and gentility wraps in splendour the gloomy existence of the parents in senescence will be but by force torn from the bosom of the family to face, gun in hand, another youngster who like himself was the enchantment of his home and whom he does not hate and cannot hate for he even does not know him.

The flames of discontent revived by the blow of tyranny each time more enraged and cruel in every country and here and there everywhere and in all parts, the fists contract, the minds exalt, the hearts beat violently, and where they do not murmur they

shout, all sighing for the moment in which the calloused hands during hundred centuries of labor, they must drop the fecund tools and grab the rifle which nervously awaits the caress of the hero.

Companions; the moment is solemn. It is the moment preceding the greatest political and social catastrophe the History registers, the insurrection of all people against existing conditions.

It will be surely a blind impulse of the masses which suffer, it will be without a doubt, the disorderly explosion of the fury restrained, hardly by the revolver of the bailiff and the gallows of the hangman; it will be the overflow of all the indignation and all the sorrows and will produce the chaos, the chaos favourable to all who fish in turbid waters; chaos from which may sprout new oppressions and new tyrannies for in such cases, regularly, the charlatan is the leader.

It falls to our lot, the intellectual, to prepare the popular mentality until the moment arrives, and while not preparing the insurrection, since insurrection is born of tyranny.

Prepare the people not only to await with serenity the grand events which we see glimmer, but to enable them to see and not let themselves be dragged along by those who want to induce them, now over a flowery road, towards identic slavery and a similar tyranny as today we suffer.

To gain that the unconscious rebelliousness may not forge with its own hands, a new chain that anew will enslave the people, it is precise, that all of

use, all that do not believe in government, all that are convinced that Government which soever its form may be and whoever may be the head, it is tyranny, because it is not an institution created for the protection of the weak, but to support the strong, we place ourselves at the height of circumstances and without fear propagate our holy anarchist ideal, the only just, the only human, the only true.

To not do it, is to betray, knowingly the vague aspirations of the populace to a liberty without limits, unless it be the natural limits, that is, a liberty which does not endanger the conservation of the specie.

To not do it, is giving free hand to all those who desire to benefit merely their own personal ends through the sacrifice of the humble.

To not do it is to affirm what our antagonists assure, that the time is still far away when our ideals will be adopted.

Activity, activity and more activity, is the demand of the moment.

Let every man and every woman who loves the anarchist ideal propagate with tenacity, with inflexibility, without heeding sneer not measuring dangers and without taking on account the consequences.

Ready for action and the future will be for our Ideal. Land and Liberty.

Given in Los Angeles, State of California, United States of America, the 6th day of March, 1918.

RICARDO FLORES MAGON
LIBRADO RIVERA

Note: Answers to this Manifesto forward to Ri-

cardo Flores Magon, P. O. Box 1236, Los Angeles, Cal., U. S. A.

Contrary to the form of Statute in such case made and provided, and against the peace and dignity of the said United States;

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths, aforesaid, do further present:

That Ricardo Flores Magon and Librado Rivera, whose full and true names are, and that the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 16th day of March, 1918, at Los Angeles, within the State and Southern Division of the Southern District of California, did knowingly, wilfully, unlawfully and feloniously make and convey false statements and reports with the intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, the United States being then and there at war, by then and there publishing and causing to be published in a certain newspaper known as "Regeneracion", published and printed in said City of Los Angeles, California, a certain article, which said article and a true and correct translation of said article are set out at length in the first count hereof, at pages 3 to 10, both inclusive, and which said article and the translation thereof are hereby made a part of this second count by ref-

erence, with the same force and effect as if set out at length herein; that said article so published as aforesaid, contains the following false statements and false reports, that is to say: "The death of the old society is close at hand and will not delay much longer and only those will deny the fact whom its continuation interests", defendants meaning to charge thereby that the United States Government was then and there moribund; "the working man goes on strike not taking in account that by his action he injures the country's interest, conscious now that the country is not his property but is the property of the rich", defendants meaning thereby to state that the workingman had no part or ownership in the United States; "The flames of discontent revived by the blow of tyranny, each time more enraged and cruel in every country and here, and there, everywhere and in all parts, the fists contract, the minds exalt, the hearts beat violently, and where they do not murmur, they shout, all sighing for the moment in which the calloused hands during hundred centuries of labor, they must drop the fecund tools, and grab the rifle, which nervously awaits the caress of the heroes", defendants meaning thereby to charge that the United States Government is tyrannical and that the citizens are ready to revolt and overthrow their government; all of which statements and reports defendants then and there well knew to be false and untrue;

Contrary to the form of the Statute in such case, made and provided, and against the peace and dignity of the said United States.

THIRD COUNT.

And the Grand Jurors, aforesaid, upon their oaths, aforesaid, do further present:

That Ricardo Flores Magon and Librado Rivera, whose full and true names are, and the full and true name of each is, other than as herein stated to the Grand Jurors unknown each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 16th day of March, 1918, within the City of Los Angeles, State and Southern Division of the Southern District of California, did knowingly, wilfully, unlawfully and feloniously, when the United States was at war, cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, by then and there publishing and causing to be published in a certain newspaper published and printed in Los Angeles, California, known as "Regeneracion", a certain article, which said article and a true and correct translation thereof are set out at length in the first count hereof at pages 3 to 10, both inclusive and which said article and the translation thereof are hereby made a part of this third count by reference, with the same force and effect as if set out at length herein;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths, aforesaid, do further present:

That Ricardo Flores Magon and Librado Rivera, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 16th day of March, 1918, did knowingly, wilfully, unlawfully and feloniously use and attempt to use the United States mails for the transmission of nonmailable matter, by then and there depositing and causing to be deposited in the United States Post Office at Los Angeles, California, for mailing and delivery, a certain newspaper printed and published at Los Angeles, California, known as "Regeneracion", which said newspaper was then and there addressed to "Luz Esparza STAPLES, Guadalupe co Tex." and which said newspaper then and there contained nonmailable matter to-wit: an article, which said article and a true and correct translation thereof are set out at length in the first count hereof, at pages 3 to 10, both inclusive and which said article and the translation thereof are hereby made a part of this fourth count by reference, with the same force and effect as if set out at length herein, which said article then and there contained matter advocating and urging treason, insurrection and forcible resistance to the laws of the United States, all of which was then and there well known to the said Ricardo Flores Magon and Librado Rivera;

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the said United States.

FIFTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That Ricardo Flores Magon and Librado Rivera, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: at a time when the United States was at war, on or about the 16th day of March, 1918, did knowingly, wilfully, and unlawfully print, publish and circulate, and cause to be printed, published and circulated, in a foreign language, to-wit: The Spanish language, an editorial respecting the government of the United States, the present war, the policy of the United States and the state and conduct of the war, that is to say, the said defendants at the time and place aforesaid, did publish a certain article in a newspaper printed and published in Los Angeles, California, known as "Regeneracion" which said article and a true and correct translation thereof are set out at length in the first count hereof, at pages 3 to 10, both inclusive, and which said article and the translation thereof are hereby made a part of this fifth count by reference, with the same force and effect as if set out at length herein, without having first filed with the postmaster at Los Angeles, California, in the form of an affidavit, a true and correct and complete translation of the entire article aforesaid, as required by law;

Contrary to the form of the Statute in such case

made and provided and against the peace and dignity of the said United States.

SIXTH COUNT.

And the Grand Jury aforesaid, upon their oaths, aforesaid, do further present:

That Ricardo Flores Magon and Librado Rivera, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 16th day of March, 1918, did knowingly, wilfully, unlawfully and feloniously deposit and cause to be deposited in the post office and the stations thereof at the City of Los Angeles, State and Southern Division of the Southern District of California, certain mail matter, to-wit: a newspaper published and printed at Los Angeles, California, known as "Regeneracion" which said newspaper was addressed to "Mrs. S. E. Raybon, 1107 Tampa St., TAMPA, FLA.", and which said newspaper did then and there contain certain indecent substance and language, and which said newspaper was a publication of an indecent character, and which said indecent substance and language was of a character tending to incite in the minds of persons reading the same murder and assassination, and which said substance and language was so printed and published in said "Regeneracion" in the Spanish language, and said article is, with a true and correct translation thereof, set out at length in the first count hereof, at pages 3 to 10, both inclusive, and

which said article and the translation thereof are hereby made a part of this sixth count by reference, with the same force and effect as if set out at length herein;

Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the said United States.

J. R. O'CONNOR,
United States Attorney.
W. F. PALMER,
Assistant U. S. Attorney.

[Endorsed]: Form No. 195. No. 1421—Crim. United States District Court, Southern District of California, Southern Division. The United States of America v. Ricardo Flores Magon and Librado Rivera. Indictment. Viol. Sec. 37 F.P.C. 1910, Conspiracy. Viol. Sec. 3, Act of June 15, 1917, Publishing false statements tending to interfere with success of military and naval forces of United States; Causing and attempting to cause insubordination, mutiny and refusal of duty in military and naval forces of United States. Viol. Sec. 3, Title XII, Act of June 15, 1917: Using mails for transmission of nonmailable matter. Viol. Sec. 19, Act of Oct. 6, 1917: Printing in foreign language matter respecting Government policies, etc., without having filed translation with post master. Viol. Sec. 211, F. P. C., 1910: Mailing indecent matter. A True Bill. Meredith P. Snyder, Foreman. Filed Apr. 19, 1918. Chas. N. Williams, Clerk; by Geo. W. Fenimore, Deputy Clerk.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Defendants.

Demurrer.

Now come the defendants in their own proper person and by counsel a demurrer to the indictment herein for the following reasons, to-wit:

1. Because the facts stated in the first count of the indictment do not constitute an offense against the United States.

2. Because the facts stated in the second count of the indictment do not constitute an offense against the United States.

3. Because the facts stated in the third count of the indictment do not constitute an offense against the United States.

4. Because the facts stated in the fourth count of the indictment do not constitute an offense against the United States.

5. Because the facts stated in the fifth count of the indictment do not constitute an offense against the United States.

6. Because the facts stated in the sixth count of the indictment do not constitute an offense against the United States.

7. Because said indictment is duplicitous in this: that several distinct offenses against several separate statutes are charged and attempted to be charged in each count of said indictment, that is to say:

(a) The defendants are charged with the violation of Section 3 of Title one of the Act of Congress approved June 15th, 1917, commonly known as the "Espionage Act".

(b) The defendants are charged with the violation of Section 3 of Title 12 of the Act of Congress approved June 15th, 1917, commonly known as the "Espionage Act".

(c) The defendants are charged with the violation of Section 19 of the Act of Congress approved October 6th, 1917, commonly known as the Trading with the Enemy Act.

(d) The defendants are charged with the violation of Section 211 of the Federal Penal Code of 1910 as amended and that said several distinct offenses require evidence of a different character to justify conviction and are punishable differently.

8. Because it is charged in the indictment and in each count thereof that the defendants wrote and caused to be written and published a certain article containing false reports and false statements which would tend to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies and to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and would ob-

struct the recruiting service of the United States, whereas in truth and in fact the matters and things set out in the indictment and at each count thereof, as being false reports and false statements, are mere matters of opinion, and that the matters and things charged against the defendants as false statements and false reports, to-wit: "The death of the old society is close at hand and will not delay much longer and only those will deny the fact whom its continuation interests" and, "The workingman goes on a strike not taking in account that by his action he injures the country's interest, conscious now that the country is not his property, but is the property of the rich", and, "The flames of discontent revived by the blow of tyranny, each time more enraged and cruel in every country, and here and there, everywhere and full parts, the fists contract, the minds exalt, the hearts beat violently and where they do not murmur, they shout, all sighing for the moment in which the calloused hands during hundred centuries of labor, they must drop the fecund tools, and grab the rifle, which nervously awaits the caress of the heroes", are mere matters of opinion of the defendants, mere empty rhetoric, words,—words,—words,—words,—signifying nothing, and not false statements or false reports within the statute or within any reasonable construction of the statute or statutes which the defendants are charged with violating.

J. H. RYCKMAN,
Attorneys for the Defendants.

AT A STATED TERM, to wit: The January A.D., 1918 Term of the United States District Court, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 29th day of April, in the year of our Lord, one thousand nine hundred and eighteen.

PRESENT:

Honorable BENJAMIN F. BLEDSOE,
District Judge.

No. 1421—Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICARDO FLORES MAGON and LIBRADO RIVERA,
Defendants.

THIS cause coming on this day for the hearing of defendants' Demurrer to the Indictment herein; W. F. Palmer, Esq., Assistant United States Attorney, appearing as counsel for plaintiff; J. H. Ryckman, Esq., appearing as counsel for defendants, who are present in custody of the United States Marshal; on motion of J. H. Ryckman, Esq., Counsel for plaintiff consenting thereto, IT IS ORDERED that this cause be and the same hereby is continued until 2 o'clock P.M. of this day; and now, at the hour of 2 o'clock P.M., Court having reconvened, and counsel for plaintiff being present as before, and J. H. Ryckman, Esq., and Chaim Shapiro, Esq., appearing as

counsel for defendants, who are present in Court in custody of the United States Marshal; and argument in support of said demurrer to Indictment having been made by J. H. Ryckman, Esq., of counsel for defendants, and argument in opposition thereto having been made by W. F. Palmer, Esq., of counsel for plaintiff, and the Court being fully advised in the premises, now sustains said Demurrer as to the second count, and overrules said demurrer as to each and every other count therein contained, to which ruling of the Court defendants except; and defendants having waived a formal reading of the Indictment, and having entered their pleas of NOT GUILTY to the remaining counts contained in the Indictment, which said pleas are by the Court ordered entered herein. IT IS FURTHER ORDERED that this cause be and the same hereby is continued until Monday, May 6, 1918, for setting for trial.

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 1421—Criminal.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICARDO FLORES MAGON, and LIBRADO RIVERA,

Defendants.

We, the Jury in the above-entitled cause, find the defendant, Ricardo Flores Magon, Guilty as

charged in the first count of the Indictment, and Guilty as charged in the third count of the Indictment, and Guilty as charged in the fourth count of the Indictment, and Guilty as charged in the fifth count of the Indictment, and Guilty as charged in the sixth count of the Indictment; and the defendant Librado Rivera, Guilty as charged in the first count of the Indictment, and Guilty as charged in the third count of the Indictment, and Guilty as charged in the fourth count of the Indictment, and Guilty as charged in the fifth count of the Indictment, and Guilty as charged in the sixth count of the Indictment.

A. A. ALLEN,
Foreman.

Los Angeles, California, July 17th, 1918.

[Endorsed]: No. 1421 Cr. U. S. District Court, Southern District of California, Southern Division. United States vs. Ricardo Flores Magon and Librado Rivera. Verdict. Filed Jul. 17, 1918. Chas. N. Williams, Clerk. By T. F. Green, Deputy Clerk.

AT A STATED TERM, to wit: the JULY A.D., 1918 Term of the United States District Court, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 19th day of July, in the year of our Lord, one thousand nine hundred and eighteen.

PRESENT:

Honorable BENJAMIN F. BLEDSOE,
District Judge.

No. 1421—Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICARDO FLORES MAGON and LIBRADO RIVERA,
Defendants.

This cause coming on this day for the sentence of defendants; W. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant United States Attorneys, appearing as counsel for plaintiff; defendants appearing in Court in custody of the United States Marshal, with their counsel, Chaim Shapiro, Esq., J. H. Ryckman, Esq., and S. G. Pandit, Esq., and J. H. Ryckman, Esq., of counsel for defendants, having filed a Motion herein in Arrest of Judgment, which said Motion was argued, in support thereof by said J. H. Ryckman, Esq., and in opposition thereto by W. F. Palmer, Esq., of counsel for plaintiff, and the Court being fully advised in the premises, NOW ORDERS that said Motion in Arrest of Judgment be and the same hereby is denied; to which ruling of the Court defendants request an exception be noted. The Court thereupon pronounces sentence upon the defendants for the crime of which they now stand convicted, viz: Conspiracy, in violation of Section 37, Federal Penal Code of 1910; Publishing false statements tending to interfere with success of military and naval forces of United States; causing and attempting to cause insubordination, mutiny and refusal of duty in military and naval forces of the

United States, in violation of Section 3, Act of June 15, 1917; Using mails for transmission of nonmailable matter, in violation of Section 3, Title XII, Act of June 15, 1917; Printing in foreign language matter respecting Government policies, etc., without having filed translation with Post Master, in violation of Section 19, Act of October 6, 1917; Mailing indecent matter, in violation of Section 211 Federal Penal Code of 1910, as follows:

The Judgment of the Court is that the defendant, RICARDO FLORES MAGON, be imprisoned in the United States Penitentiary, at McNeil Island, State of Washington, for the term and period of two (2) years, and that he pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars, on the first (1st) count contained in the Indictment; and that he be imprisoned in the said United States Penitentiary for the term and period of twenty (20) years, and that he pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars, on the third (3rd) count contained in the Indictment; and that he be imprisoned in said United States Penitentiary for the term and period of five years, and that he pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars on the fourth (4th) count contained in the Indictment; and that he be imprisoned in said United States Penitentiary for the term and period of five (5) years, and that he pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars on the sixth (6th) count contained in the Indictment; and

that he be imprisoned for the term and period of one (1) day in the Los Angeles County Jail, at Los Angeles, State of California, on the fifth (5th) count contained in the Indictment, and for said one days' sentence, a final commitment issue forthwith.

IT IS FURTHER ORDERED that upon the payment of the sum of Five Thousand ($5,000.00) Dollars, the amount of the fine imposed on the first (1st) count of the Indictment, shall operate in full satisfaction of the fines imposed on the third (3rd), fourth (4th) and sixth (6th) counts of the Indictment. IT IS FURTHER ORDERED that the defendant stand committed in the said United States Penitentiary until said fine is paid. IT IS FURTHER ORDERED that all Penitentiary sentences herein imposed begin and run concurrently. IT IS FURTHER ORDERED that the terms of imprisonment now imposed on said first (1st), third (3rd), fourth (4th) and sixth (6th) counts shall commence and run concurrently from and after the expiration of a term of imprisonment heretofore imposed upon said defendant of one (1) year and one (1) day, and a fine of One Thousand ($1,000.00) Dollars, in cause No. 1071 Crim., United States of America, plaintiff, vs. Enrique Flores Magon, et al., and that final commitment issue for said sentence in cause No. 1071 Crim. forthwith.

The Judgment of the Court is that the defendant, LIBRADO RIVERA, be imprisoned in the United States Penitentiary, at McNeil Island, State of Washington, for the term and period of two (2) years, and that he pay to the United States of America, a fine

in the sum of Five Thousand ($5000.00) Dollars, on the first (1st) count of the Indictment; that he be imprisoned in said United States Penitentiary for the term and period of fifteen (15) years and that he pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars on the third (3rd) count of the Indictment; and that he be imprisoned in said United States Penitentiary for the term and period of five (5) years, and that he pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars on the fourth (4th) count contained in the Indictment; and that he be imprisoned in said United States Penitentiary for the term and period of five (5) years, and pay to the United States of America, a fine in the sum of Five Thousand ($5,000.00) Dollars on the sixth (6th) count of the Indictment; and that he be imprisoned in the Los Angeles County Jail, at Los Angeles, State of California, for the term and period of one (1) day, on the fifth (5th) count of the Indictment, and for said one (1) days' sentence, a final commitment issue forth.

IT IS FURTHER ORDERED that upon the payment of the sum of Five Thousand ($5,000.00) Dollars, the amount of the fine imposed on the first (1st) count, it shall operate in full satisfaction of the fines imposed on the third (3rd), fourth (4th), and sixth (6th) counts. IT IS FURTHER ORDERED that all Penitentiary sentences herein imposed shall begin and run concurrently.

J. H. Ryckman, Esq., of counsel for defendants, having moved the Court for a Stay of Execution of

ten (10) days, and good cause appearing therefor, IT IS ORDERED that the issuance of the Penitentiary Commitments be stayed for the period of ten (10) days from this date.

IT IS FURTHER ORDERED that the defendants may have twenty (20) days within which to prepare, serve and file their Proposed Bill of Exceptions on Appeal herein, and that Appeal Bond be and the same hereby is set in the sum of Fifty Thousand ($50,000.00) Dollars. Defendants are remanded to the custody of the United States Marshal.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Defendants.

Proposed Bill of Exceptions

Be it remembered that upon arraignment of the defendants in said cause, the said defendants by their counsel demurred to the said indictment, said demurrer, omitting the caption, being in words and figures as follows, to-wit:

Now come the defendants in their own proper person and by counsel and demur to the indictment herein for the following reasons, to-wit:

1. Because the facts stated in the first count of the indictment do not constitute an offense against the United States.

2. Because the facts stated in the second count of the indictment do not constitute an offense against the United States.

3. Because the facts stated in the third count of the indictment do not constitute an offense against the United States.

4. Because the facts stated in the fourth count of the indictment do not constitute an offense against the United States.

5. Because the facts stated in the fifth count of the indictment do not constitute an offense against the United States.

6. Because the facts stated in the sixth count of the indictment do not constitute an offense against the United States.

7. Because said indictment is duplicitous in this: that several distinct offenses against several separate statutes are charged and attempted to be charged in each count of said indictment, that is to say:

(a) The defendants are charged with the violation of Sec. 3 of Title 1, of the Act of Congress approved June 15th, 1917, commonly known as the "Espionage Act".

(b) The defendants are charged with the violation of Sec. 3 of Title 12 of the Act of Congress approved June 15th, 1917, commonly known as the "Espionage Act".

(c) The defendants are charged with the viola-

tion of Sec. 19 of the Act of Congress approved October 6th, 1917, commonly known as the Trading with the Enemy Act.

(d) The defendants are charged with the violation of Sec. 211 of the Federal Penal Code of 1910 as amended and that said several distinct offenses require evidence of a different character to justify conviction and are punishable differently.

8. Because it is charged in the indictment and in each count thereof that the defendants wrote and caused to be written and published a certain article containing false reports and false statements which would tend to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies and to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and would obstruct the recruiting service of the United States, whereas in truth and in fact the matters and things set out in the indictment and at each count thereof, as being false reports and false statements, are mere matters of opinion, and that the matters and things charged against the defendants as false statements and false reports, to-wit: "The death of the old society is close at hand and will not delay much longer and only those will deny the fact whom its continuation interests", and,

"The workingman goes on a strike not taking in account that by his action he injures the country's interest, conscious now that the country is not his property, but the property of the rich", and,

"The flames of discontent revived by the blow of tyranny, each time more enraged and cruel in every country, and here and there, everywhere and full parts, the fists contract, the minds exalt, the hearts beat violently and where they do not murmur, they shout, all sighing for the moment in which the calloused hands during hundred centuries of labor, they must drop the fecund tools, and grab the rifle, which nervously awaits the caress of the heroes", are mere matters of opinion of the defendants, mere empty rhetoric, words,—words,—words,—words,—signifying nothing, and not false statements or false reports within the statute or within any reasonable construction of the statute or statutes which the defendants are charged with violating.

J. H. RYCKMAN,
CHAIM SHAPIRO,
Attorneys for the Defendants.

which said demurrer, except as to the second count, was by the Court overruled, to which ruling of the Court the defendants and each of them then and there excepted.

Be it further remembered that this cause came on regularly for trial on the 15th day of July, 1918, in the above entitled Court before his Honor, Benjamin F. Bledsoe, as Judge thereof; that a jury of twelve men was thereupon regularly impaneled and sworn to try the cause upon the indictment herein, and the plea of Not Guilty and each of the defendants thereto, and the following proceedings among others were had and testimony as set out herein, together with other testimony not incorporated was taken.

Emilio Kosterlitzky being called as a witness on the part of the Government and being duly sworn, testified as follows:

My name is Emilio Kosterlitzky; I am interpreter and translator for the Department of Justice of the United States and have been in such employ two years.

Being handed a paper by Counsel for the Government, the witness referring to the paper testified:

I have seen that before; I bought it from a newsstand on Main Street in this city; I paid five cents for it; it is dated March 16th, 1918. (Paper is marked "United States Exhibit No. 1"). This paper is marked "File one", it contains an article headed "Manifesto" and signed "R. F. Magon" and "Librado Rivera"; I made a translation of that article "Manifesto"; I am familiar with the Spanish language; the indictment contains a true and correct translation of the article contained in the paper just identified as the Manifesto; I have known the defendant Magon more than twenty years; I first knew the defendant Magon in Mexico City; whereupon the witness was excused.

Julius Jansen, a witness called on behalf of the Government testified as follows on direct examination by Mr. Palmer:

My name is Julius Jansen; I am Superintendent of Mail at the Postoffice in the City of Los Angeles; it was part of my duty to receive articles printed in foreign languages under Sec. 19 of the Trading with the Enemy Act; I saw the article under the head "Manifesto" signed Ricardo Flores Magon and Li-

brado Rivera published in Regeneracion March 16th, 1918; I saw quite a number of those papers that were put in the United States' mails; I identify them as having been mailed at the Los Angeles Postoffice; no translation into the English language of that article the Manifesto of March 16th, 1918 in the newspaper Regeneracion was filed with the Postoffice Department in Los Angeles; no affidavit of translation was filed at any time; I took out a number of the copies that were in the bundle at the time they were posted; they came in in a collection and the bundle was taken from a collection; about a dozen copies and they were all found to be the same; two copies were sent to the Postoffice Department at Washingington and the remainder kept here; I took them out myself; I took a bundle to Mr. Cookson, the Postoffice inspector; with the exception of two copies they were all taken to Inspector Cookson; about twelve copies or so.

Walter M. Cookson being called as a witness on behalf of the Government testified on direct examination as follows:

I am Postoffice inspector; I have been such for nearly twenty years; I was the inspector to whom was submitted the bundle of papers introduced here yesterday for identification by Mr. Jansen; they bore the cancellation mark "United States Post Office Los Angeles"; they were placed in the mails at the Postoffice in Los Angeles; I know the United States Ship McCullough is the United States revenue cutter; one of the papers or packages identified yesterday by Mr. Janson was one of the papers brought

to me as having been mailed; (package handed to witness with the request that he open it. Witness accordingly did). That is the paper that was in the package when it came into my hands; the paper and wrapper came into my hands through the Superintendent himself, Julius Jansen; he handed the paper with the wrapper to me with others; they were in the same condition they now are in, except some of those marked by the clerk, that is to say which bore a stamp and the stamp had been cancelled; they were ready to be transmitted through the mails and were held up by order of the Department; about a year and a half ago I received orders; I went through an examination this morning to get a copy of the bill of advice of denial of mailing privileges to this paper Regeneracion; it could not go through the mails either as first, second, third or fourth class, and that order came to my attention about a year and a half ago, and it was in pursuance of the directions in that order that these papers were held by the Superintendent of Mails; they came into my hands from the Superintendent after they had been held up by him from the direction of the department, and he was acting upon the same instructions that I was from the General Postoffice at Washington; I counted the number of packages; there were 78 altogether; I opened 22; in the wrapper I found Volume 4, No. 262, March 16th, 1918 of the paper Regeneracion, some were of February, 1918.

(The Government offered in evidence Exhibits No. 7 and No. 8, being packages containing divers is-

sues of the paper Regeneracion.) Referring to these the witness testified:

The papers in these exhibits were turned over to me by Superintendent of Mails; they all bear the post mark of the Postoffice at Los Angeles, with the exception of one copy; all these papers were mailed at the Los Angeles Postoffice; there is one marked Magdalena C. Carrero, Bishop Road, Box 1726, City. This is one of the largest packages that I examined; it is the edition of February, 1918, Volume 4, No. 268, July 28th, 1917, the latter being the issue of the paper Regeneracion containing the speech of the defendant Ricardo Flores Magon delivered May 27th, 1917, in Italian Hall in the City of Los Angeles, at the meeting organized by the International Workers Defense League; this number of the paper Regeneracion of July 28th, 1917 was mailed after the order had been issued prohibiting the use of the mails; I recall as one of the papers offered in evidence by the Government the issue of Regeneracion of March 16th, 1918, being No. 262 with the address Felipe V. Arzodon, U. S. Ship McCullough, said paper being offered in evidence as U. S. Exhibit No. 9; I identified the package offered in evidence as U. S. Exhibit No. 10 being a copy of the issue of Regeneracion of March 16th, 1918 and being addressed to Christian Fernandez, Abogado, Mongaloran, Canzassanan, Phillipine Islands; this paper contained the Manifesto set out in the indictment in this case; I heard the defendant Ricardo Flores Magon testify in a case in this Court in regard to the ownership and editorship of the paper Regeneracion, at which time the defendant Ri-

cardo Flores Magon in substance said under oath that he and his brother were the editors and owners of the Regeneracion.

On cross-examination the witness testified:

I never saw either of these defendants depositing any of these papers offered in evidence by the Government in the Postoffice; these papers were handed over to me by the Superintendent on the 17th of March, 1918 for the purpose of examination to ascertain from their contents as to whether there was anything in them constituting a violation of the Espionage Act or the Trading with the Enemy Act, and incidentally to ascertain whether they contained any matter that had been forbidden before; I had the papers examined by translators; my attention was attracted to the paper by the heading Manifesto; I found nothing in the issue of the paper for March 16th, 1918, that was objectionable in my opinion, except the Manifesto; it appeared to me to be in violation of the Espionage Act or Trading with the Enemy Act, and I submitted it to the United States Attorney for examination, pursuant to instructions and in the performance of my duty.

On re-direct examination the witness testified:

I went to the home of defendant Ricardo Flores Magon on Ivanhoe Ave., Edendale in this city; I was out there three times; I do not remember the exact dates; the last time was in April after these papers had been seized by the Postoffice Department; I had been out there prior to that time; I noticed they had a small printing establishment; it was the home of defendant Magon; I did not go into the house, how-

ever; the house is 2253 Ivanhoe Avenue; I saw several drawers of type and a printing press large enough to print Regeneracion; I saw Ricardo Magon there and his wife and their correspondence goes to that address.

William E. Purviance, a witness produced on behalf of the Government testified as follows:

I have been connected with the United States Army since March 1892, and I am now Lieutenant-Colonel; I am recruiting officer for the United States Army in Los Angeles and Southern California and the State of Arizona; I am endeavoring to secure volunteers for the United States Army; I am familiar with the work that was being done on or about March 16th, 1918, in regard to securing men for the national army, so far as it concerns an army recruiting officer; I have heard that there is a submarine base at San Pedro; I know there are United States soldiers located at Fort MacArthur; saw quite a good many of them; many men of the army and navy may be seen upon the streets of Los Angeles and were there during March, 1918; I have been conducting recruiting for the United States Army since March, 1918; there are recruiting stations in the city of Los Angeles for the United States Navy; in the territory covered by my activities as recruiting officer there are a number of men of Mexican extraction who enlist in the service.

On cross-examination the witness testified:

I do not know whether any of the soldiers at Fort MacArthur or any of the soldiers at the submarine base speak or understand the Spanish language, and

as to the soldiers and sailors that I saw from time to time in the streets of Los Angeles I do not know that they either speak or understand the Spanish language; the language of the army is the English language and orders and regulations and everything of that kind are printed in English; everything official is in English and no other language is used for giving orders.

Be it remembered further that the Government offered in evidence and read to the jury, over the objection of the defendants and each of them, the following article from an issue of the paper Regeneracion, under date of July 28th, 1917, in words and figures as follows, to-wit:

SEE, HEAR, HUSH.

Speech pronounced by Ricardo Flores Magon, Sunday, May 27 in Italian Hall; at the meeting organized by the International Workers' Defense League in defense of comrades Raul Palma and Odilon Luna.

Comrades:

All of you know that on the 6th of this month, and while they spoke to the workers congregated at the Plaza, Raul Plama and Odilon Luna were arrested by some members of the police of this city. Palma and Luna were making use of the right that all human beings have to expose their ideas for their acceptance or rejection. The utmost composure reigned at the meeting and all indicated that the act would end happily and with great benefit from the ideals of human emancipation that the proletarian speakers propounded;

but the police, headed by one Rico, took it upon themselves to inject disorder where order reigned and dragged the speakers to jail. Now, the federal authorities are trying to deport Palma and Luna to Mexico because they are anarchists, so that Carranza may shoot them. For they will not be delivered to Zapata, they will not be delivered to Villa, neither shall they be put in the hands of Cedillo, of Pelaez, of Sibalaume or of any other rebel; Palma and Luna will be put at the disposal of the cowardly and cunning enemy of the working class; they shall be put in the hands of Venustiano Carranza, the lackey of Wilson and of the bandits of Wall Street. The pretext used for these deportations of members of the proletarian class, is that their utterances are injurious to the country owing to the special circumstances in which it finds itself. In reality anarchist doctrines are not injurious to any country, but to the pocketbooks of the vampires who live from the sweat of the workers. The words of the anarchist are words of truth and justice. If because this country is engaged in the european carnage, our words are obnoxious, they are undoubtedly, to the interests of the capitalist class; but not to the interests of the people who are the producers of all wealth. Our words hurt those who take advantage of the european slaughter to fill their coffers. Our words hurt the enemies of humanity; our words hurt only those who are interested in the subsistence of the inequality of fortunes; but in what way do our doctrines hurt human beings who waste their existence in the factory and the shop? What injury does the peasant suffer by our

words who is obliged to work a land that is not his, and who bent and jaded deposits in the endless furrow, with the seeds that shall produce rich grain for the master, his sweat, his health and his hopes? How can the words of the anarchist hurt the man or woman who has to work in order to live?

Our words hurt all of those who live from the labor of others; our words hurt the parasites, the useless and noxious beings who suck the blood of the people. The clergyman, the bourgeois and the ruler; these are the ones who are injured by our words. So much the worse for them, so much the better for us!

That the country is at war and that is why we cannot talk. Bully reason this! It is precisely because the country is engaged in a war for the declaration of which the opinion of each and all of its inhabitants was not taken into account, that we must talk, and we must talk high and loud, hurt whom it may and no matter what the consequence of our words may be. What interest have we the disinherited in this war? Are we the wretched going to have more bread for ourselves and for our dear ones? Are we going to be freer? No; we shall be forced, as poor that we are, to shoulder a rifle, and we shall be dragged to the trenches to be torn to pieces by grapeshot, so that Rockefeller and Morgan and all the bankers, and all the merchants, and all the bandits who exploit the proletariat may increase their millions and thereby their power. We shall give our blood in the trenches that our masters may debauch in banquets the product of our sacrifice. We shall render our existence in the battlefield, and when in

the desolated home our dear ones mourn our banishment, and in it reign mourning, weeping, sorrow and hunger, our hangmen shall put in their pockets the price of our pain and sacrifice.

We, the anarchists, cannot shut up; we shall not shut up. So long as injustice reigns, our voice shall be heard. We are not actuated by caprice, but by the sovereign urge of reason which points the way of duty to us, and all injustice, all imposition, all exploitation shall have to stumble over our resistance and our protest.

Comrades: The order of the day put in force by our tyrants is silence. Do you suffer? Very well, devour your bitterness in silence. Does injustice make you indignant? So much the worse for you, for you shall have to swallow your rage.

For tyranny, silence is a virtue, and the best citizen, in spite of the blood that humanity has shed in the struggle for liberty, continues to be he who steadfastly observes the black maxim that, that, to the shame of this country, continues to embrace the entirety of duties of the oppressed toward the oppressor; to see, hear, and hush.

In this century of the aeroplane and the zeppelin; in this epoch of the wireless and the submarine; when God tumbles from the skies at the blast of reason, and human thot reaches with its powerful wings the lofty summit of the anarchist ideal, the old order of see, hear and hush is an anomaly, it constitutes an outrage which men possessing free minds reject with indignation.

See, hear and hush was tolerated in the obscure

times of Torquemada and Arbues when humanity knew no other light than the livid flames of the inquisitorial fires; see, hear and hush was the supreme law, before which the serf of the Middle Ages patiently bowed his head; but that damnable law was buried with the bones of its upholders under the ruins of the Bastile. Why excavate those ruins and axtract from its sepulchre and poison the atmosphere with the corpse of a law which culture rejects, which a new conception of human dignity cannot tolerate and which threatens to drag us to a past of shame and humiliation, from which we are redeemed at the price of the blood and sacrifice of our ancestors?

After the Bastile, after the Commune and privilege and tyranny, in Mexico and in Russia, feel in their throats the choleric hands of the people and from Chapultepec and from Petrograd emerge on their knees the last spawns of the pharahos and the caliphs, it is a shame, it is an outrage that the shady emblem of oppression be unfolded to the light of the sun, the black flag of despotism with its shameful inscription of see, hear and hush.

To hush, when all invites us to speak; to hush when we must shout. Go on, you haughty overlords, swallow your order, for we the anarchists are not disposed to obey it, we cannot shut up, we will not shut up, and we shall speak, cost what it may.

To hush, remain with our lips sealed thru fear when before our eyes you revel in your feast of hyenas, to hush, when you are draining millions of proletarian arteries in the fields of Europe to turn into

gold the blood of the humble; to hush, when mourning invades millions of homes, until yesterday smiling and happy; to hush, when our hearts break to pieces before the sobs and tears of the orphans and the widows of the victims sacrificed to your ambition; to hush, when civilization is seriously menaced under the hoofs of allied and teutonic prussianism, is the same whip whether it be in the service of democracy or autocracy; to hush, when the progress slowly and painfully attained thru centuries and centuries and centuries, is at the point of perishing; to hush, so that those above may oppress those below at will, is something that we anarchists cannot do, you contemptuous lords. Above your caprice is our right, right which we do not owe to you, but to nature which has endowed us with a mind to think, and in the defense of a right, understand it well, we are ready for anything and to face it all, be it the dungeon or the gallows. Don't forget that right, no matter how much you may mutilate it, no matter how much you may crush it, no matter how much you may try to annihilate it, when it is persecuted the most, and when you are proudest of your triumph, it roars its vengeance in dynamite belches lead from the barricade.

The spring of every revolt is a violated right; the driving spirit of every insurrection is a wounded right; a persecuted right engenders the revolution. It was not powder that acted in the revolver of Pardinas; it was an outraged right; in the danger of Caserio it was a trampled right that flashed. To crush a right is to throw wide open the doors of re-

bellion. Press harder, you tyrants, that peoples need the rigors of oppression to remind them that they have the right to be free!

RICARDO FLORES MAGON.

Be it remembered further, that the Government offered in evidence and read to the jury over the objection of the defendants and each of them, the following from the newspaper Regeneracion under date of March 16th, 1918, in words and figures as follows, to-wit:

ON THE WAY TO GOLGATHA

February 6, 1918.

Dear Faithful Friends:

How many have gone the way to Golgatha, and how many will have to go? Only Time, the Great Redeemer of all who are made to suffer for their ideals, can tell. Time hangs heavily on those who cherish great hope, but it moves with surprising swiftness and far beyond our fondest dreams.

Russia stands a glowing proof of that. In 1905 the Tsar's troops drenched the streets of Petrograd and other cities with the blood of the Revolutionists. In 1917 the revolutionary troops, more human than those who did the butchery, drove the Tsar out of Russia.

This thought came to my mind when I was being dashed up Fifth in a police patrol automobile to the Pennsylvania Station on Monday, February 5th.

The Avenue and streets were lined with a curious mob, awaiting the parade of the soldiers from Camp Upton. Like the soldiers of the Tsar before 1915 who saw in every revolutionist an enemy to their

country, the American soldiers would have greeted me with scorn and jeers and at the command of their Tsar would have taken my life in the ignorant believe that they were saving their country from a dangerous enemy.

Will Time do for America what it has done for Russia? Will her soldiers some day make common cause with her people? Who can say what the future will bring?

The idealist may not be a prophet, but he nevertheless knows what the future will bring change, and knowing he lives for the future he is giving infinite strength to support the present.

So I, too, Dear Friend, will be strengthened while in prison by the passionate belief in the future, by the hope that the two years taken out of my life may help to quicken the great events Time has in store for the human race. With that as my guiden star, confinement, convict's clothes and the other indignities the guilty conscience of society heaps upon those it dares not face, means no hardship.

You will want to help me while I am in prison, I know. You can do so in various ways. First, take care of my love child, Mother Earth Bulletin. I leave to your sympathetic care. I know that you will look after her tenderly, so that I may find her bigger, stronger and more worth while when I return from Jefferson. Secondly, spread my Boylsheviki pamphlet in tribute to their great courage and marvelous vision and for the enlightenment of the American people. Thirdly, join the League for the Amnesty of the Political Prisoners. And finally, write

to Berkman and myself. Allways address us as Political Prisoners. Allways sign your full name.

Good bye, dear friends, but not for long—if the spirit of the Boylsheviki prevails. Long live the Boylsheviki! May their flames spread over the world and redeem humanity from its bondage!

Affectionately,
EMMA GOLDMAN,
U. S. Political Prisoner,
Jefferson Prison,
Jefferson City, Mo.

Mother Earth Bulletin,
4 Jones Street,
New York City.

Other evidence tending to support and prove the allegations of the indictment, was offered by the Government and received.

Thereupon the Government rested and the defendants offered no testimony in their own behalf and rested.

Be it remembered further, that the defendants and each of them, after the first witness, to-wit, Emilio Kosterlitzky had been sworn to testify on behalf of the Government, objected to the court receiving any evidence on the part of the prosecution to sustain either the first, or the third, or the fourth, or the fifth, or the sixth count of the indictment, for the reason that neither the first, the third, the fourth, the fifth, nor the sixth count of said indictment states facts sufficient to constitute an offense against the United States, which said objection was overruled by the

Court, to which ruling and order the defendants and each of them then and there duly excepted.

Be it remembered further that upon the offer being made by the Government to introduce in evidence a certain speech pronounced by defendant, Ricardo Flores Magon, on May 27th, 1917, and printed in the paper Regeneracion under date of July 28th, 1917, the defendants and each of them then and there objected to the introduction of said speech in evidence as aforesaid, for the reason that it is incompetent, irrelevant and immaterial and not within the issues, that it does not prove or tend to prove any allegation of the indictment or to sustain any issue in the case on any of the counts; because it is too remote; and the defendant Librado Rivera especially objected for the reason that there was nothing contained in said speech to connect directly or indirectly the defendant Rivera with the utterance of the sentiments therein contained, and because the reported speech does not show upon its face, and cannot be taken to be the utterances of the defendants or either of them, although they appear in the newspaper Regeneracion of the date of July 28th, 1917, and there is nothing to show that the defendants or either of them authorized the name of Ricardo Flores Magon to be attached to the printed copy of said speech, and there is nothing apart from the article itself to indicate that the defendant Ricardo Flores Magon uttered these sentiments or read the article, or delivered the speech. Whereupon the Court overruled said objections and each of them, and the defend-

ants and each of them then and there duly excepted to said ruling and order of the Court.

Be it remembered further that upon the Government offering to introduce in evidence from the Government's Exhibit No. 11, being the issue of Regeneracion for March 16th, 1918, a certain article therein appearing under the head "On the Way to Golgatha", that the defendants and each of them objected to the introduction of said article in evidence in the case, for the reason that said article is incompetent, irrelevant and immaterial and not within the issues and hearsay; no foundation whatever being made to show that either defendant was connected with it, that it had no tendency to bind either of the defendants and the defendant Librado Rivera especially objected because at no time does it appear from the evidence that he was the editor or manager of said paper Regeneracion on March 16th or any other time, and for the further reason that said article "On the Way to Golgatha" purports only to be an expression of sentiments of a third party, and not binding upon the defendants or either of them; whereupon the Court overruled said objections and each of them, and the defendants and each of them then and there duly excepted.

Be it remembered further that upon conviction of the defendants and before judgment the defendants and each of them moved the Court to arrest judgment upon the verdict, which said motion, omitting the caption was and is in words and figures as follows, to-wit:

Now come the defendants, Ricardo Flores Magon

and Librado Rivera, each for himself, after verdict and before sentence and move the court that judgment be arrested herein as to each of said defendants on count one, count three, count four, count five and count six of the indictment, for the following reasons, to-wit:

1. Because the facts stated in the first count of said indictment do not constitute an offense against the United States.

2. Because in said first count it is attempted to charge against the defendants a conspiracy to violate,

(a) Sec. 3 of title 1 of the Espionage Act approved June 15th, 1917;

(b) Sec. 3 of title 12 of the Espionage Act approved June 15th, 1917;

(c) Sec. 19 of the Trading with the Enemy Act approved October 6th, 1917;

(d) Sec. 211 of the Penal Code.

3. Because each of said crimes which it is alleged in said first count the defendants conspired to commit, requires evidence of a different character to justify conviction.

4. Because the facts stated in the third count of said indictment do not constitute an offense against the United States.

5. Because in the said third count the defendants are charged with the commission of the same crime, to-wit, the violation of Sec. 3 of title 1 of the Espionage Act, which it is charged in the first count of the indictment they conspired to violate, and because both the first count and the third count of the indict-

ment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

6. Because the facts stated in the fourth count of the said indictment do not constitute an offense against the United States.

7. Because in the said fourth count the defendants are charged with the commission of the same crime, to-wit, the violation of Sec. 3 of title 12 of the Espionage Act, which it is charged in the first count of the indictment they conspired to violate, and because the first count and the fourth count of the indictment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

8. Because the facts stated in the fifth count of the indictment do not constitute an offense against the United States.

9. Because in the fifth count of the said indictment the defendants are charged with the commission of the same crime, to-wit, the violation of Sec. 19 of the Trading with the Enemy Act, approved October 6th, 1917, which it is charged in the first count of the indictment they conspired to violate, and because the first count and the fifth count of the indictment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

10. Because the facts stated in the sixth count of the said indictment do not constitute an offense against the United States.

11. Because in the said sixth count the defendants are charged with the commission of the same crime, to-wit, the violation of Sec. 211 of the Penal Code, which it is charged in the first count of the indictment they conspired to violate, and because both the first count and the sixth count of the indictment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

12. Because the gravaman of each of the five offenses charged against the defendants in said indictment in the five counts thereof, upon which they have been convicted, is the same for each.

13. Because the separate and distinct offenses charged against the defendants in said several five counts of the indictment are alleged to have been committed by them, and each of them, at the same time and the said five offenses so charged are shown upon the face of the indictment to be one and the same continuous act of the defendants inspired by the same criminal intent, and that an essential and indispensable element of each of said five offenses is one and the same criminal intent.

14. Because the essential element of each of the five offenses charged against the defendants in said five counts of the indictment upon which the defendants have been convicted was the same act in each of

said five counts, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

15. Because it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred against the accused.

16. Because the Government cannot split up one crime and prosecute it in parts either by separate counts in one indictment or by several indictments, for the reason that each count in this indictment is in fact a separate indictment, requiring evidence of a different character to justify conviction and punishable differently.

17. The Government cannot split up one crime and prosecute it in several parts under different indictments, or under several counts in the same indictment, nor can the defendants be convicted and punished for five different and distinct crimes growing out of the same identical act, to-wit, the issuance of the manifesto, so-called, set out in the first count of the indictment.

18. Because the gist of the offense charged in the third count of the indictment against the defendants is wilfully causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States, and this offense cannot be charged in the same indictment with the offense attempted to be charged in either the first, fourth, fifth, or the sixth count of the said indictment.

19. Because the gist of the offense attempted to be charged in the fourth count of the indictment against

the defendants, is unlawfully using or attempting to use the United States mails for the transmission of non-mailable matter, to-wit, a newspaper containing a copy of the manifesto, so-called, set out in the first count of the indictment, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first or the third, or the fifth, or the sixth counts of the said indictment.

20. Because the gist of the offense attempted to be charged against the defendants in the fifth count of the indictment is unlawfully printing, and publishing and circulating the aforesaid manifesto set out in the first count of the indictment, in the Spanish language without having first filed with the Postmaster of Los Angeles, California, the translation thereof, as required by law, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth, or the sixth counts of the said indictment.

21. Because the gist of the offense attempted to be charged in the sixth count of the indictment is unlawfully depositing in the Postoffice a newspaper containing the manifesto, so-called, set out in the first count of the indictment, in violation of Sec. 211 of the Penal Code, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth or the fifth counts of the said indictment.

22. Because the Government cannot by giving different names to the same thing done or by prosecuting the defendants under different statutes, multiply offenses out of one and the same thing done by the accused, to-wit, the issuance of the manifesto, so-called, set out in the first count of the indictment.

23. Because altho the offenses charged against the defendants in the five counts of the indictment are different in name, they are in fact the same and grow out of only one transaction, to-wit, the manifesto, so-called, set out in the first count of the indictment.

J. H. RYCKMAN
Attorney for Defendants,
CHAIM SHAPIRO
Attorney for Defendants,
S. G. PANDIT
Attorney for Defendants.

Which said motion in arrest of judgment was then and there denied by the Court, to which ruling and order the defendants and each of them then and there duly excepted.

AND FORASMUCH as the evidence and matters of exception hereinbefore set forth do not fully appear of record, the defendants Ricardo Flores Magon and Librado Rivera by their attorneys, tender this proposed bill of exceptions, within the time allowed by the Court and pray that the same be signed and sealed by the Court here, pursuant to the statute in such case made and provided.

Which is done accordingly this 17th day of January, 1919.

BENJAMIN F. BLEDSOE,
Judge.

J. H. Ryckman
C. Shapiro
S. G. Pundit
Attys. for Defendants

[Endorsed]: No. 1421—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. United States of America, Plaintiff, v. Ricardo Flores Magon and Librado Rivera, Defendants. Proposed Bill of Exceptions. Received copy of within Proposed Bill of Exceptions this 16th day of August, 1918. Robert O'Connor, Attorney for Plaintiff. J. H. Ryckman, 920 Higgins Bldg., Los Angeles, California, Attorney for Defendants. Filed Jan. 17, 1919. Chas. N. Williams, Clerk. By Murray C. White, Deputy Clerk. Filed Aug. 16, 1918, at 15 min. past 3 o'clock P.M. Chas. N. Williams, Clerk. Murray C. White, Deputy.

The delay in the presentation of the within proposed Bill, from Aug. 21, 1918, till Dec. 28, 1918, unexplained, required that the allowance & approval of the time be denied. 12/28/18. Bledsoe, Judge. Vacated. Bledsoe, Judge. 1/17/19.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICARDO FLORES MAGON and LIBRADO RIVERA,
Defendants.

Petition for Writ of Error

And now come Ricardo Flores Magon and Librado Rivera, defendants herein, by J. H. Ryckman, Chaim Shapiro and S. G. Pandit, their attorneys, and say that on the nineteenth day of July, A. D. 1918, this court entered judgment herein against these defendants, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of these defendants, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may

be sent to the Circuit Court of Appeals aforesaid.

J. H. RYCKMAN
CHAIM SHAPIRO
S. G. PANDIT
Attorneys for Defendants.

[Endorsed]: No. 1421—Crim. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, Plaintiff, v. Ricardo Flores Magon and Librado Rivera, Defendants. Petition for Writ of Error. Filed Dec. 7, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. J. H. Ryckman, Lawyer, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California. 62741.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Defendants.

Assignment of Errors

Ricardo Flores Magon and Librado Rivera, defendants in the above entitled cause, by J. H. Ryckman, Chaim Shapiro and S. G. Pandit, their attorneys, in connection with their petition for a Writ of Error, make the following Assignment of Errors,

which we allege occurred upon a trial of said cause:

1. The Court erred in overruling the demurrer to the first count of the indictment, for the reason that said first count does not state facts sufficient to constitute an offense against the United States.

2. The Court erred in overruling the demurrer to the third count of the indictment, for the reason that said third count does not state facts sufficient to constitute an offense against the United States.

3. The Court erred in overruling the demurrer to the fourth count of the indictment, for the reason that said fourth count does not state facts sufficient to constitute an offense against the United States.

4. The Court erred in overruling the demurrer to the fifth count of the indictment, for the reason that said fifth count does not state facts sufficient to constitute an offense against the United States.

5. The Court erred in overruling the demurrer to the sixth count of the indictment, for the reason that said sixth count does not state facts sufficient to constitute an offense against the United States.

6. The Court erred in overruling the demurrer to the indictment for the reason that said indictment is duplicitous in this: that several distinct offenses against several separate statutes are charged and attempted to be charged in each count of said indictment, that is to say:

(a) The defendants are charged with the violation of Section 3 of Title one of the Act of Congress approved June 15th, 1917, commonly known as the "Espionage Act".

(b) The defendants are charged with the viola-

tion of Section 3 of Title 12 of the Act of Congress approved June 15th, 1917, commonly known as the "Espionage Act."

(c) The defendants are charged with the violation of Section 19 of the Act of Congress approved October 6th, 1917, commonly known as the Trading with the Enemy Act.

(d) The defendants are charged with the violation of Section 211 of the Federal Penal Code of 1910 as amended and that said several distinct offenses require evidence of a different character to justify conviction and are punishable differently.

7. The Court erred in overruling the demurrer to the indictment in this, to-wit: Because it is charged in the indictment and in each count thereof that the defendants wrote and caused to be written and published a certain article containing false reports and false statements which would tend to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies and to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and would obstruct the recruiting service of the United States, whereas in truth and in fact the matters and things set out in the indictment and at each count thereof, as being false reports and false statements, are mere matters of opinion, and that the matters and things charged against the defendants as false statements and false reports, to-wit: "The death of the old society is close at hand and will not delay much longer and only those will deny

the fact whom its continuation interests" and, "The workingman goes on a strike not taking in account that by his action he injures the country's interest, conscious now that the country is not his property, but is the property of the rich", and, "The flames of discontent revived by the blow of tyranny, each time more enraged and cruel in every country, and here and there, everywhere and full parts, the fists contract, the minds exalt, the hearts beat violently and where they do not murmur, they shout, all sighing for the moment in which the calloused hands during centuries of labor, they must drop the fecund tools, and grab the rifle, which nervously awaits the caress of the heroes", are mere matters of opinion of the defendants and not false statements or false reports within the statute or within any reasonable construction of the statute or statutes which the defendants are charged with violating.

8. The Court erred in admitting incompetent evidence to the prejudice of the defendants in this, to-wit: the Government offered in evidence and read to the jury, over the objection of the defendants and each of them an article from an issue of the paper Regeneracion under date of July 28th, 1917, the same purporting to be a speech delivered by the defendant Ricardo Flores Magon on May 27th, 1917 and thereafter printed in the paper Regeneracion under date of July 28th, 1917, said speech and article being incompetent, irrelevant and immaterial and tending only to the prejudice of the defendants and each of them and in no wise binding upon the defendant Librado Rivera, who separately and spe-

cially objected to the introduction of said article and speeches against him.

9. The Court erred in admitting in evidence upon the trial of said cause, over the objection of the defendants and each of them, of a certain letter from one Emma Goldman addressed to "Dear Faithful Friends", under date of February 6th, 1918, and printed in the newspaper Regeneracion under date of March 16th, 1918, for the reason that said letter tended only to the prejudice of the defendants and each of them, and was incompetent, immaterial and irrelevant and for further reasons more fully set out in the Bill of Exceptions herein.

10. The Court erred in not directing a verdict of Not Guilty as to each of the defendants as to the first count of the indictment.

11. The Court erred in not directing a verdict of Not Guilty as to each of the defendants as to the third count of the indictment.

12. The Court erred in not directing a verdict of Not Guilty as to each of the defendants as to the fourth count of the indictment.

13. The Court erred in not directing a verdict of Not Guilty as to each of the defendants as to the sixth count of the indictment.

14. The Court erred in denying the motion in arrest of judgment as to each of the defendants for the following reasons, to-wit:

(a) Because the facts stated in the first count of said indictment do not constitute an offense against the United States.

(b) Because in said first count it is attempted to charge against the defendants a conspiracy to violate

(1) Sec. 3 of Title 1 of the Espionage Act approved June 15th, 1917;

(2) Sec. 3 of Title 12 of the Espionage Act approved June 15th, 1917;

(3) Sec. 19 of the Trading with the Enemy Act approved October 6th, 1917;

(4) Sec. 211 of the Penal Code.

(c) Because each of said crimes which it is alleged in said first count the defendants conspired to commit, requires evidence of a different character to justify conviction.

(d) Because the facts stated in the third count of said indictment do not constitute an offense against the United States.

(e) Because in the said third count the defendants are charged with the commission of the same crime, to-wit, the violation of Sec. 3 of Title 1 of the Espionage Act, which it is charged in the first count of the indictment they conspired to violate, and because both the first count and the third count of the indictment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

(f) Because the facts stated in the fourth count of the said indictment do not constitute an offense against the United States.

(g) Because in the said fourth count the defendants are charged with the commission of the same

crime, to-wit, the violation of Sec. 3 of Title 12 of the Espionage Act, which it is charged in the first count of the indictment they conspired to violate, and because the first count and the fourth count of the indictment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

(h) Because the facts stated in the sixth count of the said indictment do not constitute an offense against the United States.

(i) Because in the said sixth count the defendants are charged with the commission of the same crime, to-wit, the violation of Sec. 211 of the Penal Code, which it is charged in the first count of the indictment they conspired to violate, and because both the first count and the sixth count of the indictment are manifestly based on the same transaction, to-wit, the composing, printing and publishing of the manifesto, so-called, set out in the first count of the indictment.

15. Because the gravamen of the offenses charged against the defendants in the first, third, fourth and sixth counts of the indictment is the same for each.

16. Because the separate and distinct offenses charged against the defendants in the first, third, fourth and sixth counts of the indictment are alleged to have been committed by them and each of them and each of them at the same time, and the said four offenses so charged in said counts one, three, four and six are shown upon the face of the indictment to be one and the same continuous act of the defend-

ants, inspired by the same criminal intent and that an essential and indispensable element of each said four offenses is one and the same criminal intent.

17. Because the essential element of each of the four offenses charged against the defendants in the first count, the third count, the fourth count and the sixth count upon which the defendants have been convicted and judgment pronounced, was the same act in each of said four counts, to-wit, the first count, the third count, the fourth count and the sixth count, that is to say, the composing, printing and publishing of the Manifesto so-called, set out in the first count of the indictment.

18. Because it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred against the accused.

19. Because the Government cannot split up one crime and prosecute it in parts either by separate counts in one indictment or by several indictments, for the reason that each count in this indictment is in fact a separate indictment, requiring evidence of a different character to justify conviction and punishable differently.

20. The Government cannot split up one crime and prosecute it in several parts under different indictments, or under several counts in the same indictment, nor can the defendants be convicted and punished for four different and distinct crimes growing out of the same identical act, to-wit, the issuance of the manifesto, so-called, set out in the first count of the indictment.

21. Because the gist of the offense charged in the

third count of the indictment against the defendants is wilfully causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States, and this offense cannot be charged in the same indictment with the offense attempted to be charged in either the first, fourth, fifth or the sixth count of the said indictment.

22. Because the gist of the offense attempted to be charged in the fourth count of the indictment against the defendants, is unlawfully using or attempting to use the United States mails for the transmission of non-mailable matter, to-wit, a newspaper containing a copy of the manifesto, so-called, set out in the first count of the indictment, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first or the third, or the fifth, or the sixth counts of the said indictment.

23. Because the gist of the offense attempted to be charged against the defendants in the fifth count of the indictment is unlawfully printing, and publishing and circulating the aforesaid manifesto set out in the first count of the indictment, in the Spanish language without having first filed with the Postmaster of Los Angeles, California, the translation thereof, as required by law, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth, or the sixth counts of the said indictment.

24. Because the gist of the offense attempted to

be charged in the sixth count of the indictment is unlawfully depositing in the Postoffice a newspaper containing the manifesto, so-called, set out in the first count of the indictment, in violation of Sec. 211 of the Penal Code, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth or the fifth counts of the said indictment.

25. Because the Government cannot by giving different names to the same thing done or by prosecuting the defendants under different statutes, multiply offenses out of one and the same thing done by the accused, to-wit, the issuance of the manifesto, so-called, set out in the first count of the indictment.

26. Because altho the offenses charged against the defendants in the five counts of the indictment are different in name, they are in fact the same and grow out of only one transaction, to-wit, the manifesto, so-called, set out in the first count of the indictment.

J. H. RYCKMAN
CHAIM SHAPIRO
S. G. PANDIT
Attorneys for Defendants.

[Endorsed]: No. 1421—Crim. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, Plaintiff, v. Ricardo Flores Magon and Librado Rivera, Defendants. Assignment of Errors. Filed Dec. 7, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. J. H. Ryckman,

Chaim Shapiro, S. G. Pandit, Attorneys for Defendants. J. H. Ryckman, Lawyer, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California. 62741.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Defendants.

Order Allowing Writ of Error

Upon motion of J. H. Ryckman, Chaim Shapiro and S. G. Pandit, attorneys for the defendants, Ricardo Flores Magon and Librado Rivera, and upon filing of the petition for writ of error and assignment of errors, it is ordered that a writ of error be, and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein.

BLEDSOE,

Judge.

[Endorsed]: No. 1421—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiff, v. Ricardo Flores Magon

and Librado Rivera, Defendants. Order Allowing Writ of Error. Filed Dec. 28, 1918. Chas. N. Williams, Clerk. R. S. Zimmerman, Deputy. J. H. Ryckman, Chaim Shapiro, S. G. Pandit, Attorneys for Defendants. J. H. Ryckman, Lawyer, Suite 921, Higgins Building, Second and Main Sts., Los Angeles, California. 62741.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1421—Crim.

RICARDO FLORES MAGON and LIBRADO RIVERA,

Plaintiffs in Error,

v.

UNITED STATES OF AMERICA,

Defendant in Error.

Præcipe for Certified Copy of Record

TO THE CLERK OF SAID COURT:

Please issue a certified copy of the record in the above cause, consisting of the names and addresses of the attorneys; the indictment, plea, verdict and judgment; bill of exceptions; assignment of errors; writ of error, citation on writ of error and præcipe; said record to be certified under the hand of the Clerk and seal of the Court.

Dated this 8th day of March, 1919.

J. H. RYCKMAN,
CHAIM SHAPIRO,
S. G. PANDIT,
Attorneys for Plaintiff in Error.

[Endorsed]: Original. No. 1421—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. Ricardo Flores Magon and Librado Rivera, Plaintiffs in Error, v. United States of America, Defendant in Error. Præcipe for Certified Copy of Record. Filed Mar. 8, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. J. H. Ryckman, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California, 62741, Attorneys for Plaintiffs in Error.

No. 3318.

2

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Ricardo Flores Magon and Librado Rivera,
Plaintiffs in Error,
v.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

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J. H. RYCKMAN,
CHAIM SHAPIRO,
Attorneys for Plaintiffs in Error.

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No. 3318.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

Ricardo Flores Magon and Librado Rivera,
Plaintiffs in Error,
v.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

The Plaintiffs in Error herein, hereinafter designated as the defendants, were indicted in the United States District Court, Southern District of California, Southern Division on April 19th, 1918. They were charged in six counts with six distinct offenses, to-wit, in the first count, with conspiracy under Section 37 of the Federal Penal Code of 1910; in the third count with the violation of Section 3 of the Act of June 15th, 1917; that is to say, with the publication of false statements tending to interfere with the success of the military and naval forces of the United States, and causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States; in the fourth count with the violation of Section 3, Title

XII, Act of June 15th, 1917, that is with using the mails for the transmission of non-mailable matter; and in the fifth count with the violation of Section 19, Act of October 6th, 1917; that is to say, with the printing in a foreign language matter respecting Government policies, etc., without having filed a translation with the Postmaster; and in the sixth count with the violation of Section 211 of the Penal Code of 1910; that is to say with the mailing of indecent matter. The demurrer to the second count of the indictment was sustained and the defendants proceeded to trial upon the other five counts of the indictment.

Upon argument of the demurrer the defendants contended that the indictment is duplicitous in this, that several distinct offenses against several separate statutes are charged, and attempted to be charged in one indictment, and that said five offenses so charged are shown upon the face of the indictment to be one and the same continuous act of the defendants, inspired by the same criminal intent, and that the essential and indispensable element of each of said five offenses is one and the same criminal intent, and that the gravaman of each of the five offenses charged against the defendants in the first, the third, the fourth, the fifth and the sixth count of the indictment is the same for each, but that the essential element of each of the five offenses charged against the defendants in said five counts of the indictment was the same act in each of said five counts, to-wit: the composing, printing and publishing of the Manifesto so-called, set out in the first

count of the indictment; that it is a fundamental rule of law that out of the same facts a series of charges cannot be preferred against the defendants; that the Government cannot split up one crime and prosecute it in parts by separate counts in the same indictment, for the reason that each of said five counts in the indictment is in effect a separate indictment, requiring evidence of a different character to justify conviction, and punishable differently; that the Government cannot split up one crime and prosecute it in several parts under several counts in the same indictment, nor can the defendants be convicted and punished for five different and distinct crimes growing out of the same identical act, to-wit: the issuance of the Manifesto so-called, set out in the first count of the indictment; because the gist of the offense charged in the third count of the indictment against the defendants is wilfully causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States, and this offense cannot be charged in the same indictment with the offense attempted to be charged in either the first, fourth, fifth, or the sixth count of the said indictment; because the gist of the offense attempted to be charged in the fourth count of the indictment against the defendants, is unlawfully using or attempting to use the United States mails for the transmission of non-mailable matter, to-wit: a newspaper containing a copy of the Manifesto, so-called, set out in the first count of the indictment, and this offense cannot be joined in the same indictment with the

offenses attempted to be charged against the defendants in either the first or the third, or the fifth, or the sixth count of the said indictment; because the gist of the offense attempted to be charged against the defendants in the fifth count of the indictment is unlawfully printing, and publishing and circulating the aforesaid Manifesto set out in the first count of the indictment, in the Spanish language without having first filed with the Postmaster of Los Angeles, California, the translation thereof, as required by law, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth, or the sixth counts of the said indictment; because the gist of the offense attempted to be charged in the sixth count of the indictment is unlawfully depositing in the Post-office a newspaper containing the Manifesto, so-called, set out in the first count of the indictment, in violation of Section 211 of the Penal Code, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth, or the fifth count of the said indictment; because the Government cannot by giving different names to the same thing done or by prosecuting the defendants under different statutes, multiply offenses out of one and the same thing done by the accused, to-wit: the issuance of the Manifesto, so-called, set out in the first count of the indictment; because although the offenses charged against the defendants in the five counts of the in-

dictment are different in name, they are in fact the same and grow out of only one transaction, to-wit: the Manifesto, so-called, set out in the first count of the indictment.

The demurrer was overruled as to the first, third, fourth, fifth and sixth counts, and at the close of the trial the jury found the defendants and each of them guilty on each of said counts, and thereafter they were sentenced to a long term of imprisonment in the penitentiary at MacNeil's Island and to pay a heavy fine.

ARGUMENT.

The defendants have contended from the beginning that the facts stated in each of the five counts of the indictment upon which they were tried, do not constitute an offense against the United States. Upon this point the defendants will submit no authorities, for the reason that no precedents exactly in point are obtainable, and the Court must, therefore, for itself determine whether or not the contention is sound.

The gist of the allegations in these counts is that the article complained of, upon which the prosecution is based, contained false reports and false statements which would tend to interfere with the operation of the military and naval forces of the United States, and would tend to promote the success of the enemies of the United States, and would tend to cause insubordination, disloyalty; mutiny and refusal of duty in the military and naval forces of the United States, and would obstruct the recruiting service of the United States. This matter, it is

obvious, must be left to the judgment of the Court, and authorities if they could be found would aid but little in determining this question. We respectfully submit, however, that the so-called Manifesto contains no false reports and no false statements, having the tendency as alleged in the indictment, and that in fact there are no such things as false reports or false statements in the Manifesto. The matters as therein set forth are mere matters of opinion, and it has frequently been held by the District Courts of the United States in their separate jurisdictions that mere matters of opinion are not within the contemplation of the statute, and certainly it is unnecessary to argue that if the statements made in the Manifesto are expressions of opinion, they are not false reports or false statements within the purview of the several statutes which it is alleged in the indictment have been infringed. An inspection of the demurrer will disclose to the Court that those portions of the Manifesto relied upon by the prosecution are not in any sense of the word either false reports or false statements.

The next point to which we wish to call the Court's attention is the duplicitous character of the indictment. It was said in an early New York case, in which the most distinguished lawyers of New York were counsel "that the rule permitting the trial of a person for several offenses at the same time is not authoritatively established, and that it ought not to be. It has not been the practice to allow two distinct offenses to be tried at the same time, either

by indictment or final action. Besides the confusion and embarrassment in which a trial at one time for many offenses would involve the accused, such a practice, if tolerated, would break down and utterly obliterate many principles of law that are very well established and essential to the safety of the citizens."

People v. Liscomb, 60 N. Y. 550.

The Government cannot split up one crime and prosecute it in several parts, nor can a defendant be convicted and punished for two distinct crimes growing out of the same indentical act. The law does not permit a single individual act to be divided so as to make out of it two distinct indictable offenses.

People v. Stephens, 79 Cal. 428.

It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.

Regina v. Erlington, 9 Cox C. C. 86.

To give our constitutional provision the force evidently meant, and to render it effective, the same offense must be interpreted as equivalent to the same criminal act.

1 Bishop's Crim. L. 1060.

The State cannot split up one crime and prosecute it in parts.

Jackson v. State, 14 Ind. 327;
State v. Laws, 2 Hawks, 98, 11 A.D. 441;
State v. Cooper, 13 N.J.L. 361, 25 A.D. 490;
Fisher v. Commonwealth, 1 Bush 211; 89 A.D. 620;
Drake v. State, 60 Ala. 43.

Separate offenses which are committed at the same time and are parts of a continuous criminal act inspired by the same criminal intent, which is an essential element of each offense are but one crime.

Stevens v. McClaughry, 207 F. 18, 51 L. R. N. 390.

In a celebrated case the following language was used by Chief Justice Waite, and we think the principle enunciated therein is sound: "Whenever in any criminal transaction a felonious intent is essential to render it a crime, without proof of which no conviction can be had, two informations, founded upon the same intent cannot be maintained."

Munson v. McClaughry, 198 F. 72, 42 L. R. N. 302, 303.

Logan v. U. S., 123 F. 291;

U. S. v. Miner, 26 F. Cases, No. 15780.

"If an indictment contains different counts which are in fact for seperate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are sworn for the trial thereof, the Court may quash the same lest it may confound the prisoner in his defense, or prejudice his challenge of the jury."

State v. Shores (W. Va.), 13 A.S.R. 875;

State v. Bell, 92 A.D. 661, 665. Note.

"True rule as to joinder of counts in information or indictment is, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legit-

imate one; but where the object, purpose, and effect is to prosecute the defendant for separate felonies by one information, or indictment, the court will not permit it to be done, as the injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice."

People v. Aikin (Mich.) 11 A.S.R. 512.

The eighth assignment of error relates to the introduction in evidence over the objection of the defendants of a certain speech made by defendent Ricardo Flores Magon on May 27th, 1917, and published in his paper, Regeneracion, under date of July 28th, 1917. Defendants contend that the introduction of this evidence is prejudicial error, for the reason that same was incompetent, irrelevant and immaterial, and the defendant Librado Rivera especially objected on the ground that he ought not to be bound in any wise by what was said by his co-defendant in a public speech on May 27th, 1917, and afterwards reprinted in Spanish in a paper over which he had no control.

The ninth assignment of error relates to the introduction of evidence over the objection of the defendants of a letter from Emma Goldman under date of February 6th, 1918, which was afterwards printed in the newspaper belonging to the defendant Ricardo Flores Magon under date of March 16th, 1918, on the ground that said evidence introduced by the Government against the defendants was incompetent, immaterial and irrelevant and tended only to the prejudice of the defendants and each of them. At the time of the trial of this case the intro-

duction of any communication from Emma Goldman to the defendants indicating or tending to indicate a friendly relationship between the said Emma Goldman and the defendants could not be other than highly prejudicial. The defendants respectfully submit that this evidence ought not to be admitted into the case against them, and that its introduction was prejudicial error, for which this cause ought to be reversed.

People v. Colburn, 105 Cal. 648, 38 P. 1105;
People v. Fitzgerald, 156 N.Y. 253, 50 N.E. 846;
Willett v. People, 27 Hun (N.Y.) 469;
People v. Luke, 9 N.Y. St. 638;
People v. Green, 1 Park, Cr. (N.Y.) 11;
Packer v. U. S., 106 Fed. 906, 46 C.C.A. 35.

Respectfully submitted,

J. H. RYCKMAN,
CHAIM SHAPIRO.
Attorneys for Plaintiffs in Error.

No. 3318. 3

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Ricardo Flores Magon and Librado Rivera,

Plaintiffs in Error,

vs.

United States of America,

Defendant in Error.

ANSWERING BRIEF OF DEFENDANT IN ERROR.

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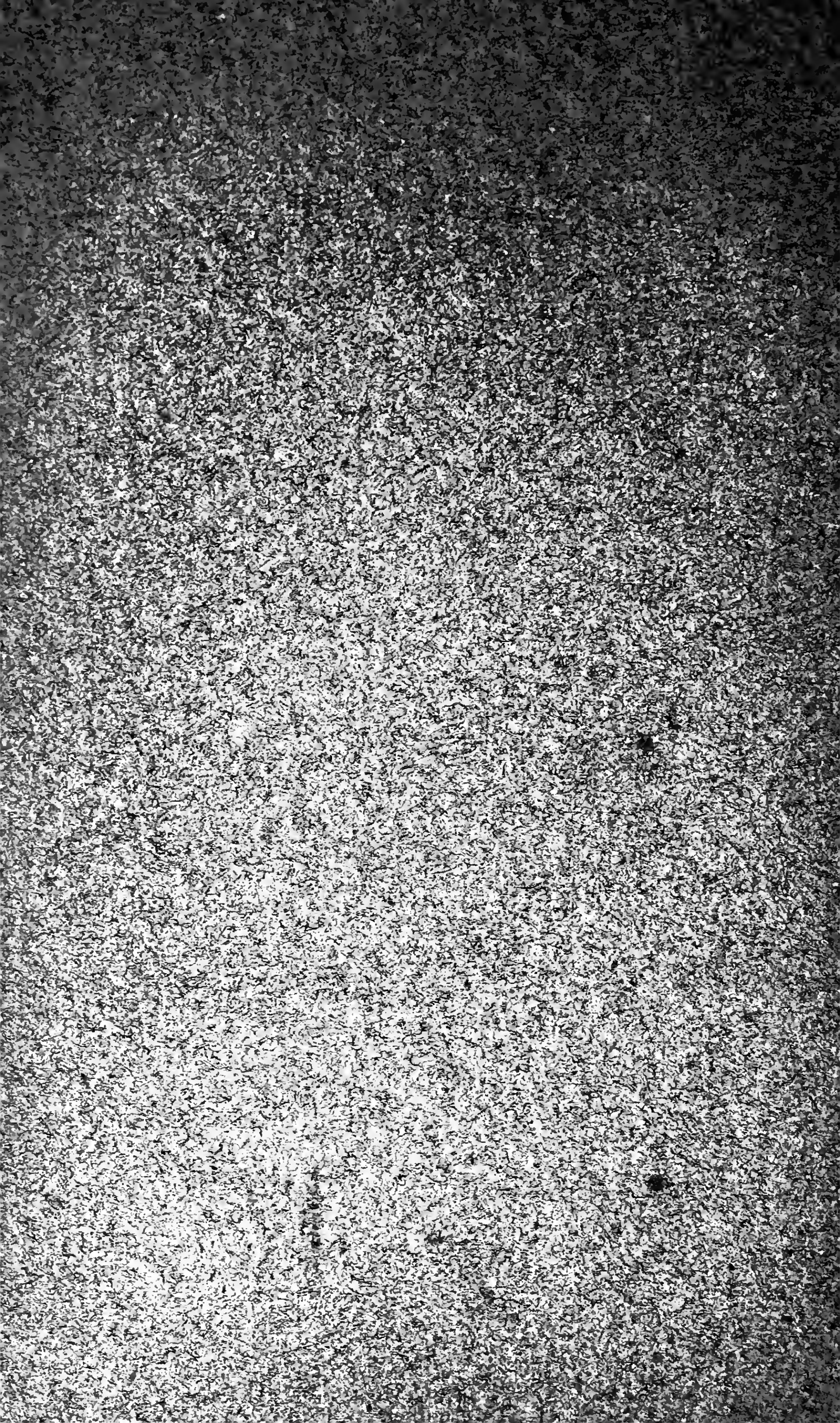

No. 3318.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Ricardo Flores Magon and Librado Rivera,

Plaintiffs in Error,

vs.

United States of America,

Defendant in Error.

ANSWERING BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiffs in error are self-announced anarchists. Magon had been connected with the publication of "Regeneracion," an anarchist newspaper, for some years. This paper, because of its character, had been denied the use of the United States mails. The article called "Manifesto" upon which the indictment is based

was signed by both defendants. Defendant Magon owned the printing office and press where the paper was printed. Rivera, when arrested, had upon his person three copies of the paper containing the "Manifesto" which were separately wrapped, the wrapper duly addressed and postage stamps attached ready for mailing. Many of the papers were deposited in the mails at the postoffice, all duly stamped and addressed. Two of them were addressed to men upon the U. S. Ship McCollough, then a portion of the naval forces of the United States. Some were addressed to persons in the Philippine Islands. The papers were also placed on sale at news stands in the city of Los Angeles. All the matters charged in the indictment arose out of the writing, printing, publishing, mailing and circulating of the article called "Manifesto" which defendants published in the paper "Regeneracion" dated March 16th, 1918.

The assignments of error which are discussed in plaintiffs' brief are:

I. That the indictment does not state an offense against the United States.

See Trans. p. 62, Assmts. 1 to 5, inclusive.

II. That the indictment is duplicitous.

See Trans. p. 62, Assmt. 6.

III. That the admission of a speech made by Magon and printed in a prior edition of the same newspaper was error.

See Trans. p. 64, Assmt. 8.

IV. That the reading to the jury of a letter from Emma Goldman published in the issue of March 16, the same in which the "Manifesto" appeared, was error.

See Trans. p. 65, Assmt. 9.

Upon these assignments the reversal is asked. This waives all other assignments.

I.

It is claimed in plaintiffs' brief, page 7, "that the facts stated in each of the five counts of the indictment upon which they (the defendants) were tried, do not constitute an offense against the United States."

No authority is cited for the alleged reason that "no precedents exactly in point are obtainable."

We believe such authority is at hand, and we cite the following:

Goldman v. U. S., 245 U. S. 474, 476;
Schenck v. U. S., decided Mar. 3, 1919;
Baer v. U. S., decided Mar. 3, 1919, No. 10 U. S. S. C. Advance Opinions p. 289;
Frohwerk v. U. S., decided Mar. 10, 1919, No. 10 U. S. S. C. Advance Opinions p. 306;
Debs v. U. S., decided Mar. 10, 1919, No. 10 U. S. S. C. Advance Opinions p. 309;
Shaffer v. U. S., No. 3220 in Ninth Circuit, Judge Gilbert writing opinion;
Bulletin No. 190, Interpretation War Statutes;
Magon v. U. S., 248 Fed. 201.

See:

Jelke v. U. S., 255 Fed. 264, 274, *et seq.*

II.

The indictment is not duplicitous.

a. The first count charges a conspiracy to violate Sec. 3 of Title I, and Sec. 3 of Title XII, of the Espionage Act, and Sec. 19 of the Trading with the Enemy Act, and Sec. 211 of the Penal Code.

This charges but one offense,—that of conspiracy, being a violation of section 37, Penal Code.

Duplicity consists in stating two or more offenses in the same count of the indictment.

> 22 Cyc. p. 376;
> 12 Stand. Ency. Proc. p. 499, XI, Note (b), p. 500;
> U. S. v. Morse, 161 Fed. 429, 437;
> Allison v. U. S., 216 Fed. 326, 329;
> Lewellen v. U. S., 223 Fed. 18, 20.

Where a count of an indictment charges a conspiracy to violate more than one penal law of the United States it is not therefore duplicitous, the charge being that of conspiracy. To make such a count duplicitous it must charge two distinct conspiracies.

In

> Frohwerk v. U. S., decided Mar. 10, 1919, No. 10 U. S. Supreme Court Advance Opinions, April 1, 1919, pp. 306, 308,

Justice Holmes, writing the opinion of the court, says:

> "Countenance, we believe, has been given by some courts to the notion that a single count in an indictment for conspiracy to commit two offenses is bad for duplicity. This court has

given it none. Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co., 248 U. S. 55, 60, 61 [ante 57-59, 39 Sup. Ct. Rep. 38]; Joplin Mercantile Co. v. United States, 236 U. S. 531, 548, 59 L. Ed. 705, 712, 35 Sup. Ct. Rep. 291. The conspiracy is the crime, and that is one, however diverse its objects."

See:

U. S. v. Rabinovich, 238 U. S. 78, 86;
Shepard v. U. S., 236 Fed. 73, 81;
U. S. v. Rogers, 226 Fed. 512, 515.

A demurrer was sustained to the second count.

The third count charges a violation of Sec. 3, Title I, of the Espionage Act. It is not duplicitous.

The fourth count charges a violation of Sec. 3, Title XII, of the Espionage Act. It is not duplicitous.

The fifth count charges a violation of Sec. 19 of the Trading with the Enemy Act. It is not duplicitous.

The sixth count charges a violation of Sec. 211 of the Federal Penal Code. It is single and not duplicitous.

b. It seems that the argument of plaintiffs is addressed rather to misjoinder than to duplicity.

It is well, perhaps, to direct the attention of the court to the fact that the demurrer was sustained to the second count of the indictment which charges that defendants did "make and convey false statements and reports with intent," &c., because the court held that the article did not contain such "false statements and reports," but expressions of opinion and argument. The claim of plaintiffs that the allegations of the in-

dictment are confined to false reports and false statements (Brief p. 7) is not justified. The case was not tried upon that theory, but such theory was expressly eliminated.

It is charged in the first count of the indictment [Trans. p. 6] that defendants conspired to write and publish "an article containing false reports and false statements which would tend to interfere with the operation and success," &c. It was insisted at the trial that this meant that the false reports and statements, only, would tend to interfere; but the court held that "which" referred to the "article" and not to the "false reports and false statements."

As to the remaining counts of the indictment—third, fourth, fifth and sixth—the question does not arise as there is no allegation in either of falsity.

Section 1024 of the U. S. Revised Statutes reads as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together * * *, instead of having several indictments the whole may be joined in one indictment in separate counts; * * *."

This statute controls the practice in United States Courts.

Sidebotham v. U. S., 253 Fed. 417, 418 (Ninth Circuit);
McNeil v. U. S., 246 Fed. 827;
Orth v. U. S., 252 Fed. 566, 568;

Glass v. U. S., 222 Fed. 773, 780 (Ninth Circuit);
Dillard v. U. S., 141 Fed. 303, 304 (Ninth Circuit);
Logan v. U. S., 144 U. S. 263, 295;
Pointer v. U. S., 151 U. S. 396, 400;
Ingraham v. U. S., 155 U. S. 434, 436;
Williams v. U. S., 168 U. S. 382, 390;
Morgan v. Devine, 237 U. S. 632, 640;
U. S. v. Howell, 65 Fed. 407.

The cases cited by counsel in brief, pages 10 and 11, do not sustain his contention.

Stevens v. M'Claughry, 207 Fed. 18, was a *habeas corpus,* and holds that on conviction of offenses stated in separate counts growing out of the same facts but one punishment may be adjudged.

Munson v. M'Claughry, 198 Fed. 72, was a *habeas corpus,* and holds that where one is convicted on two counts of an indictment charging violation of different statutes by the same act but one punishment may be adjudged.

In Logan v. U. S., 123 Fed. 291, one count of the indictment charged forgery of National Bank notes and another count charged forgery of the signatures to said notes. This was held to be one offense. But the same case holds that defendants could be convicted of the forgery and of having each of the forged notes in possession with intent to pass.

In U. S. v. Miner, 26 Fed. Cas. No. 15,780, two counterfeit plates were held in possession by defend-

ant, the plates being connected together, and defendant was acquitted as to one plate and the court advised the district attorney that, as there was but one possession, the second indictment ought to be dismissed, and this was done.

These are all the Federal cases cited by plaintiffs' brief on this point.

In Gavieres v. U. S., 220 U. S. 338, it was held that there was not double jeopardy where defendant was convicted and punished for 1, drunkenness and rude boisterous language, and 2, under another ordinance for insulting a public officer, the insult being the result of the use of the boisterous language aforesaid.

In Carter v. McClaughry, 183 U. S. 367, 395, the court said:

> "The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference."

In Burton v. U. S., 202 U. S. 344, 381, in speaking of the plea of *autrefois acquit,* the court said:

> "It must appear that the offense charged, using the words of Chief Justice Shaw, '*was the same in law and in fact*. The plea will be vicious *if the offenses charged in the two indictments be per-*

fectly distinct in point of law, however nearly they may be connected in fact."

In Ebeling v. Morgan, 237 U. S. 625, 628, the question was whether one who, at the same time and place, cut mail bags of the United States with intent to rob or steal the mail therein was properly sentenced to serve sentences for each bag cut, charged in separate counts, such sentences to run consecutively. It was held that such sentences were proper.

In the case at bar the first, or conspiracy, count could be made by showing some overt act done to effect a proven conspiracy; the third count could not be made on the same evidence as the first; the fourth count includes an element not in the first or third; the fifth count includes elements not in the first, third or fourth; and the sixth count includes elements not in either of the others. Each count would require some fact to be proven not necessary to any other. Hence the indictment does not "split up" an offense, and the court would have been justified in making the sentences consecutive.

The sentences to imprisonment, however, are made to run concurrently and payment of a single fine liquidates all; and the punishment adjudged is no more than could have been adjudged on the third count of the indictment. [Trans. pp. 29-31.]

Hence the plaintiffs in error have not been prejudiced, either by the trial upon the several counts, or by the conviction upon all of them, or by the passing of sentence upon all.

III and IV.

The remaining points of plaintiffs' brief deal with the admission in evidence

First, Of a speech made by defendant Magon on May 27, 1917, after war was declared, and published in the "Regeneracion" of July 28, 1917; and

Second, Of the reading in evidence of a purported letter of Emma Goldman which was printed in the same paper which they distributed, of date March 16, 1918.

First, The speech made by Magon was admissible to show the intent with which he produced and published the manifesto.

Second, The letter of Emma Goldman was admissible to show intent of both Magon and Rivera, the evidence showing Magon printed the paper and Rivera was helping to mail it, if nothing more.

Debs v. U. S., 248 U. S. . . ., decided Mar. 10, 1919, No. 10 U. S. S. C. Advance Opinions 309, 311;
I Wigmore on Ev. §367, p. 445;
Higgins v. State, 157 Ind. 57;
Republica v. Weidle, 2 Dallas (2 U. S.) 88;
Reg. v. Hunt, 1 State Trials (N. S.) 171;
Reg. v. O'Brien, 7 State Trials (N. S.) 1, 75;
Fries Case, 9 Fed. Cas. No. 5126, pp. 909, 914;
U. S. v. Burr, 25 Fed. Cas. No. 14,694;
U. S. v. Pryor, 27 Fed. Cas. No. 16,096;
Reg. v. Deasy, 15 Cox's Crim. Cas. 334;
Reg. v. Frost, 9 Car. & P. 129, 38 E. C. L. 70.

Conclusion.

Plaintiffs in error were shown to be anarchists. They also admitted it. As such they were seeking the overthrow of all governments and especially of the United States Government. It was claimed in argument that their anarchy was of a benign and salubrious character. One must then believe that when Magon said

"Above your caprice is our right, right which we do not owe to you, but to nature which has endowed us with a mind to think, and in the defense of a right, understand it well, we are ready for anything and to face it all, be it the dungeon or the gallows. Don't forget that right, no matter how much you may mutilate it, no matter how much you may crush it, no matter how much you may try to annihilate it, when it is persecuted the most, and when you are proudest of your triumph, it roars its vengeance in dynamite, belches lead from the barricade" [Trans. p. 47],

this was a mere assurance to the ignorant Mexicans to whom he was speaking and to whom the paper containing this speech was circulated, of the overpowering love for all mankind that permeated his breast and that should actuate them in their conduct to the people and country which was protecting and feeding them. That the breathings of revolution, slaughter and death of the "Manifesto" are merely figurative adjurations to loyalty and patriotism. That the circulation of Emma Goldman's letter glorifying and urging the spread of the spirit of the Bolshiviki

was only to allay excitement of the "radicals" and make them the more readily submit to the Selective Service Act. This is beyond all belief.

There is no doubt of the guilty intent of these appellants, nor of their guilty acts to effectuate that intent. Magon is now serving time for a like offense and this court approved the sentence in Magon v. U. S., 248 Fed. 201. There is no prejudicial error in the record and the judgment should be sustained.

Respectfully submitted,

ROBERT O'CONNOR,
United States Attorney;
W. F. PALMER,
Assistant United States Attorney,
Attorneys for Defendant in Error.

No. 3319

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE NORMA MINING COMPANY, a Corporation,

Appellant,

vs.

HUGH MACKAY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

FILED
APR 2 6 1919
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3319

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Appearances for Plaintiff (Appellee):

ROBINSON & ROBINSON, 401–2 Interstate Trust Building, Denver, Colorado.

Appearances for Defendant (Appellant):

GRANT H. SMITH, 657 Mills Building, San Francisco, California.

In the District Court of the United States for the District of Arizona.

No. E.–6—PRESCOTT—IN EQUITY.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Bill of Complaint.

To the Honorable Judge of the District Court of the United States for the District of Arizona:

Hugh Mackay, a citizen of the State of Colorado, brings this, his bill of complaint against the Norma Mining Company, a corporation, created, organized and existing under and by virtue of the laws of the State of Arizona, and a citizen of said State.

For a first cause of action alleges:

I.

That the plaintiff, Hugh Mackay, is a resident and citizen of the State of Colorado, residing in the city and county of Denver in said State.

II.

That the defendant, The Norma Mining Company, during all of the times and at all of the dates hereinafter mentioned, was, has since continuously been and now is a corporation created, organized and existing under and by virtue of the laws of the State of Arizona and is a citizen and resident of said State, as its statutory agent William G. Blakely, whose residence is at Kingman in the county of Mohave in the State of Arizona.

III.

That the defendant, The Norma Mining Company, for a valuable consideration, executed and delivered to the plaintiff on the 2d day [1*] of August, A. D. 1913, its promissory note for the principal sum of Sixteen Thousand Dollars ($16,000), which said promissory note is in words and figures following, to wit:

"$16,000. Denver, Colo., Aug. 2d, 1913.

Four months after date, The Norma Mining Company promise to pay to the order of Hugh Mackay Sixteen Thousand Dollars at Denver, Colo.

Value received with interest at six per cent per annum.

THE NORMA MINING COMPANY,
By R. T. ROOT,
President."

IV.

That at the time of the delivery of said promissory note and to secure the payment of the said

*Page-number appearing at foot of page of original certified Transcript of Record.

principal sum and interest thereon as mentioned in said note according to the tenor thereof, the defendant, The Norma Mining Company, duly executed and delivered to the plaintiff its mortgage deed, bearing date the 2d day of August, A. D. 1913, granting, selling and conveying unto the plaintiff, his heirs and assigns, certain premises described as follows:

> The following patented Mining Claims situate, lying and being in the Indian Secret Mining District, in the County of Mohave, and State of Arizona, viz.: The Putman, The Review, The West Half of The Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Acquarius, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R., The Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The Hillsite, The Center, The Little Giant, The Midway, The Prince Albert, The Orient, The Squattum, The Horn Silver, The Rip Van Winkle, The African, The Norma, The Garfield, The Schaefer's Treasure, The Fraction Quartz, The Emma, The Nellie Blye, The Occident, The Junction, The G. A. R., and The Daisy Mining Claims, together with the Mill and machinery therein and the different hoisting plants upon the property.

V.

That said mortgage was conditioned that if the interest or the principal of said promissory note shall not be punctually paid when the same shall become due as in said promissory note mentioned, then and in such case the principal sum of said note and the interest thereon shall be deemed and taken to be wholly [2] due and payable and proceedings may forthwith be had for the recovery of the same, either by suit on said note or on said mortgage and note.

VI.

That said mortgage was further conditioned that in any suit or other proceeding that may be had for the recovery of said principal sum and interest thereon, it would be lawful for the mortgagee, the plaintiff herein, his heirs, executors, administrators or assigns to include in the judgment that may be recovered reasonable attorneys' fees.

VII.

That said mortgage was duly acknowledged and was recorded in the office of the Recorder of the county of Mohave in said State of Arizona, on the 29th day of August, A. D. 1914, in Book 4 of Mortgages, at pages 172–173 of the records in said office.

VIII.

That the plaintiff is now the lawful owner of said promissory note and mortgage.

IX.

That default has been made in the payment of the principal and interest of said promissory note and no part thereof has been paid.

X.

That the sum of One Thousand Dollars ($1,000) would be a reasonable amount to allow to plaintiff as attorneys' fees, to be included in the judgment herein.

XI.

That the plaintiff has no adequate remedy at law in the premises and can have appropriate relief only in a court of equity where matters of the nature set forth in this bill are properly cognizable and relievable. [3]

And for a second cause of action alleges:

I.

That the plaintiff, Hugh Mackay, is a resident and citizen of the State of Colorado, residing in the city and county of Denver in said State.

II.

That the defendant, The Norma Mining Company, during all of the times and at all of the dates hereinafter mentioned was, has since continuously been and now is a corporation created, organized and existing under and by virtue of the laws of the State of Arizona and is a citizen and resident of said State, having as its stationery agent William G. Blakely, whose residence is at Kingman in the county of Mohave in the State of Arizona.

III.

That the defendant, The Norma Mining Company, for a valuable consideration, executed and delivered to the plaintiff on the 31st day of March, A. D. 1914, its two promissory notes for the aggregate principal sum of Five Thousand Dollars ($5,000), which

said promissory notes are in words and figures following, to wit:

"$3500.00 Denver, Colo., March 31st, 1914.

On or before May 1st, 1914, after date it promise to pay to the order of Hugh Mackay Thirty-five Hundred Dollars at seven per cent interest per annum.

Without defalcation, for value received.

THE NORMA MINING CO.,
By R. T. ROOT,
President."

"$1500.00 Denver, Colo., March 31st, 1914.

On or before May 1st, 1914, after date it promise to pay to the order of Hugh Mackay Fifteen Hundred Dollars at seven per cent interest per annum.

Without defalcation for value received.

THE NORMA MINING CO.
By R. T. ROOT.
President." **[4]**

IV.

That at the time of the delivery of said notes and to secure the payment of the principal and interest thereof as therein mentioned according to their tenor, the defendant, The Norma Mining Company, duly executed and delivered to the plaintiff its Mortgage Deed, bearing date the 31st day of March, in the year one thousand nine hundred and fourteen, granting and releasing unto the said plaintiff, and to his heirs and assigns forever all the following described patented mining claims situate lying and being in the county of Mohave and State of Arizona, to wit:

In Indian Secret Mining District in said Mohave County, Arizona, viz.: the Putnam, the Review, the West Half of the Hulda, the Bonita, the Mountain Scenery, the Chief of the Hill, the Monster, the Peer, the Midway Extension, the Garfield Fraction, the Acquari*n*s, the Grand Central, the Western View, the Lone Star, the Blind Goddess, the Desert Prospect, the Goadstick, the Norma Fraction, the G. A. R. Fraction, the Oversight, the Buckley, the Nora R., the Big Joshua, the Lookout, the Abe Lincoln, the Ellington, the Hillsite, the Center, the Little Giant, the Midway, the Prince Albert, the Orient, the Squattum, the Horn Silver, the Rip Van Winkle, the African, the Norma, the Garfield, the Schaefer's Treasure, the Fraction Quartz, the Emma, the Nellie Blye, the Occident, the Junction, the G. A. R., and the Daisy Mining Claim; together with all the dips, spurs, and angles, and all the metals, ores, gold and silver bearing quartz, rock and earth therein, the old dump now thereon, and together with the mill and machinery therein and the different hoisting plants on the property.

V.

That said mortgage was conditioned that the defendant pay unto the plaintiff, his executors, administrators or assigns, the sum of money mentioned in said promissory notes with interest thereon and if default be made in the payment of any part thereof that the plaintiff shall have power to sell the premises according to law.

VI.

That default has been made in the payment of the principal and interest of said promissory notes and no part thereof has been paid. [5]

VII.

That the plaintiff is now the lawful owner of said promissory notes and mortgage.

VIII.

That the plaintiff has no adequate remedy at law in the premises and can have appropriate relief only in a court of equity where matters of the nature set forth in this bill are properly cognizable and relievable.

WHEREFORE plaintiff prays:

a. That the said mortgages made by the defendant, The Norma Mining Company, to the plaintiff, Hugh Mackay, may be foreclosed as against the said defendant, The Norma Mining Company, and all persons claiming by, through or under it.

b. That an accounting be had and taken of all of the property and assets of whatsoever kind or character subject to the lien of said mortgages and that said mortgages may be decreed to be valid, liens upon all property covered thereby and therein mentioned and described or intended so to be and that the amounts due and unpaid for the principal of and interest upon said promissory notes may be ascertained and determined.

c. That the plaintiff have judgment against the defendant, The Norma Mining Company in the sum of Twenty-one Thousand Dollars ($21,000), with interest on Sixteen Thousand Dollars ($16,000)

from the 2d day of August, A. D. 1913, and on Five Thousand Dollars ($5,000) from March 31, A. D. 1913, for attorneys' fees and for costs of suit.

d. That the usual decree may be made for the sale of said mortgaged premises according to law and the practice of this court and the proceeds applied in payment of the amount due to the plaintiff.

e. That the plaintiff may become a purchaser at said sale and that the purchaser be let into the possession of the said premises.

f. That the defendant, The Norma Mining Company, and all persons claiming under it, subsequent to the execution of said mortgages [6] upon said premises, either as purchasers, encumbrancers or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said premises and every part thereof and that the defendant may be adjudged to pay any deficiency which may remain, after applying all of the proceeds of the sale of said premises properly applicable thereto after the payment of the costs of foreclosure and reasonable attorneys' fees to be fixed by this Honorable Court.

g. That the defendant, The Norma Mining Company, may be required to appear and answer this bill of complaint according to the rules and practice of this Honorable Court.

h. And that the most gracious writ of subpoena of the United States of America be directed to the said defendant, thereby commanding it at a certain time and under certain pain therein to be specified to be and appear in this Honorable Court and then

and there to answer all and singular the premises and stand to and abide such Order and Decree herein as to this Honorable Court shall seem meet.

A. C. BAKER,
ALEXANDER B. BAKER
Solicitors for Plaintiff,
317 Fleming Building, Phoenix, Arizona.

State of Colorado,
City and County of Denver,—ss.

Hugh Mackay, being first duly sworn upon oath, deposes and says, that he is the plaintiff named in the foregoing bill of complaint; that he has read the same and knows the contents thereof and that the same is true of his own knowledge.

HUGH MACKAY.

Subscribed and sworn to before me this 28th day of December, A. D. 1914.

My commission expires September 12, 1917.

[Seal] RENA A. WOLZ,
Notary Public. [7]

[Endorsed]: Filed Jan. 9, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [8]

In the District Court of the United States for the District of Arizona.

IN EQUITY.—No. E.-33 (PHX.).

HUGH MACKAY,
Plaintiff,
vs.
THE NORMA MINING COMPANY,
Defendant.

The Amended Answer and Cross-bill of the Norma Mining Company, Defendant.

The amended answer of the Norma Mining Company, a corporation, to the bill of complaint filed in the above-entitled cause and to the first cause of action therein alleged respectfully represents and shows:

This defendant reserving all manner of exceptions that may be made to the uncertainties and imperfections of the first cause of action in said bill stated, comes and answers thereto and admits:

I.

The allegations contained in paragraphs 1 and 2 of said first cause of action.

II.

This defendant, The Norma Mining Company, denies that it made, executed or delivered the promissory note set forth in paragraph 3 of said first cause of action and this defendant denies that the president of said defendant at the time of the execution and delivery of said note was authorized by the said defendant to execute the same, and this defendant alleges that if the said note was executed by the said Norma Mining Company by R. T. Root, its president, as alleged in said complaint, said execution and the conditional and limited delivery of said note, as hereinafter set out, was wholly without its authority or consent and out of the course of its regular business and without consideration to the said defendant corporation, [9] and has never been ratified by it.

III.

This defendant denies that it made, executed or delivered to the plaintiff its mortgage deed bearing date the 2d day of August, 1913, as alleged in paragraph 4 of said first cause of action in said bill of complaint contained, or any mortgage deed whatsoever, and that if said mortgage deed was made, executed and delivered to the said plaintiff purporting to be executed by this defendant (which this defendant denies), that such making, execution and delivery was without authority of this defendant, and that such deed was made, executed and delivered without its consent and out of the course of its regular business and without consideration to it, and has never been ratified by it.

IV.

This defendant denies that the sum of One Thousand Dollars ($1,000) would be a reasonable amount to allow to plaintiff as attorney's fees to be included in the judgment herein.

This defendant, reserving all manner of exceptions that may be made to the uncertainties and imperfections of the second cause of action in said bill stated, comes and answers thereto and admits.

I.

The allegations contained in paragraphs 1 and 2 of said second cause of action.

II.

This defendant, The Norma Mining Company, denies, that it made, executed or delivered the promissory notes set forth in paragraph 3 of said second cause of action, or either of them, and this defendant

denies that the president of said defendant at the time of the execution and delivery of said notes was authorized by the said defendant to execute the said notes, or either of them, and this defendant alleges that if the said notes, or either of them, were executed by the said Norma Mining Company by R. T. Root, its president, as alleged in said bill of complaint, said execution and delivery of [10] said notes was wholly without its authority or consent and out of the course of its regular business and without consideration to the said defendant corporation, and has never been ratified by it.

III.

This defendant denies that it made, executed or delivered to the plaintiff its mortgage deed bearing date the 31st day of March, 1914, as alleged in paragraph 4 of said second cause of action in said bill of complaint contained, or any mortgage deed whatsoever, and if said mortgage deed was made, executed and delivered to the said plaintiff purporting to be executed by this defendant, that such making, execution and delivery was without its consent and out of the course of its regular business and without consideration to it, and has never been ratified by it.

And having fully answered the complainant's bill herein, the defendant by way of counterclaim herein, as to both the mortgage bearing date the 2d day of August, 1913, and the one of the 31st day of March, 1914, set out and referred to in the complainant's bill herein, says that it is informed and believes and therefore alleges that prior to the execution of either and both of said mortgages there had been for a

number of years various personal loans made between the complainant herein and the then president of this defendant, R. T. Root, the latter at times loaning the complainant money or giving him accommodation checks or notes to be by the complainant negotiated for the complainant's use, and at other times the complainant advancing to said R. T. Root money or checks; that at the time of the execution of the first of said mortgages the complainant told said Root he was in great need of money, and begged him to help him by giving him some notes or securities upon which he could raise money, whereupon the said Root, without the authority or knowledge of the Board of Directors of this defendant, and without any consideration of any kind or nature whatsoever moving to this defendant from the complainant, or any person or corporation in his behalf, all of which was well known to the complainant at the time; executed in the name of the corporation and **[11]** conditionally delivered said mortgage, at the same time taking from the complainant a receipt and agreement under and by the terms of which the said complainant acknowledged that he received the said notes and mortgage for the purpose of selling them, and from the proceeds of such sale to be made within one month, to pay checks then held by said complainant as executor of the estate of George Miller, deceased, aggregating about Ten Thousand Dollars, which checks were signed by said R. T. Root personally, and of the proceeds of which this defendant had received no part; that by the terms of said agreement, so signed by said Mackay, he promised to re-

turn said mortgage and notes to said Root if he had not sold the same within *thirtynth* from August 2, 1913, and also promised that he would not record said mortgage unless he sold it within the said one month, and that the net balance after paying said checks he would turn over to said Root. That the complainant did not sell said note and mortgage, and this defendant on information and belief avers that contrary to his said agreement, the said Mackay has caused said mortgage to be recorded and contrary to the purpose for which it was delivered is now attempting to foreclose the same and appropriate it to his own use.

This defendant is further informed and believes, and upon such information and belief avers that both said complainant and said Root well knew that neither the stockholders nor the directors of this defendant company had authorized said notes and mortgage, or had any knowledge or information of the issuance of the same; yet they caused to be inserted in such mortgage a statement that the same had been authorized by the directors and stockholders of this defendant, which was contrary to the facts, as both the complainant and said Root well knew, both parties thereto fully understanding that said note and mortgage were wholly unauthorized, but the complainant insisting that it was necessary to have such a recital of authority to induce his special customer whom he named to [12] take the paper, and that said Root could thereafter procure a ratification of his acts in the premises if the sale was made, and if he, the complainant, did not make such sale within one month, the notes and mortgage could

and would be returned to said Root and cancelled, and any ratification by the corporation would be unnecessary, to which said Root assented and the agreement was drawn accordingly.

And on like information and belief this defendant avers that since such unauthorized issuance of said note for $16,000 and said mortgage, the said R. T. Root has paid and taken up all said checks then held by said complainant as executor, and has given and said complainant has accepted, his, the said R. T. Root's, personal notes therefor and still holds the same, and all said checks have been delivered by the complainant to said R. T. Root and cancelled.

And defendant further says that as to the second and last of said mortgages and the two notes aggregating five thousand dollars by the said mortgage, purporting to be secured, it is informed and believes, and therefore avers, that said notes and mortgage was made by R. T. Root, its then president, upon personal matters and dealings between said Root and the complainant and having no relation to any business or interest of this defendant, and without any consideration moving to this defendant from the complainant or any other person or corporation in his behalf; that said mortgage was executed without the knowledge of authority of the Board of Directors of this defendant; and as defendant avers upon information and belief, at the time the said Root conditionally delivered said two notes and the mortgage purporting to secure the same upon the properties of this company, he received from the complainant a receipt by which said complainant acknowledged that

he had never received from said Root two notes, one for $3,500 and the other for $1,500, together with a mortgage for same, executed by the Norma Mining Company on this defendant's property in Mohave County, Arizona; that in and by the terms of said receipt so given at the time the complainant declared and acknowledged that he only received said notes for the purpose of a loan, and covenanted [13] and agreed that if a loan was not made he would return the said notes and mortgage to R. T. Root or to one of the sons of R. T. Root and that if he procured a loan on said notes he would pay the money to one of said sons; that thereafter said Mackay advised said Root that he had only been able to raise the sum of $1,800 on said two notes, which he had paid to his son W. W. Root, and that thereafter said R. T. Root offered to repay and now stands ready to repay said $1,800, with all interest, upon the return of said notes and mortgage, and that said Mackay refused to accept such payment or to surrender said notes and mortgage, and still refuses.

And this defendant upon information and belief avers that at the time said two notes aggregating Five Thousand Dollars and the pretended mortgage securing the same were conditionally delivered by said Root to the said complainant, it was fully known to the complainant and he was so advised by the said Root, that said notes and mortgage were unauthorized by the directors and stockholders of the defendant, and the said Mackay agreed that if he did not procure a loan for said $5,000 on the property he would return both the notes and mortgage to said

Root; that this defendant is not advised whether the $1,800 so paid by said complainant was procured by the negotiation of one or both of said notes, but avers that in any event the same does not constitute a valid obligation against this defendant.

Whatever may be the rights as between said Root and said Mackay as to the $1,800, said to have been paid to said W. W. Root, certain it is that this defendant never received anything for or on account of said mortgage and notes, or any or either of them, and is in nowise bound by the same or any of the terms or conditions thereof, and the attempt to use said mortgage in the manner proposed is against equity and good conscience.

And this defendant denies that it ever executed any of the obligations or instruments sued on, and avers that they and none of them are its act or deed, or constitute a valid or existing obligation of this defendant. [14]

WHEREFORE, this defendant asks that all of said notes and mortgages be declared void, that the complainant be required to bring the same into this court to be cancelled, and to release the same of record by proper deed of release to be filed in the county where the property described therein is situate, and default of his so doing that a commissioner be appointed by this court to execute such release in the name of the complainant herein, as that this defendant may have all such other relief herein as to your

Honor may seem just and the rules and practice of equity require.

THE NORMA MINING COMPANY,
By CHAS. W. HOOVER,
Vice-president.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. L. MORGAN,
310–315 National Bank of Arizona Bldg.,
Phoenix, Arizona.
Solicitors for Defendant.

State of Illinois,
County of Cook,—ss.

Personally appeared before me, the undersigned, a notary public in and for said county and State, Chas. W. Hoover, who being first duly sworn on oath says that he is the vice-president of the Norma Mining Company, Defendant, and has read the above and foregoing amended answer of said company, and knows the contents thereof; that said answer is true except as to matters and things therein stated on information and belief and as to such matters this affiant believes the same to be true.

Witness my hand and notarial seal this 18th day of March, A. D. 1915.

[Seal] A. G. LOVELESS,
Notary Public.

My commission expires Oct. 10, 1915. [15]

[Endorsed]: Copy received Mch. 31, 1914.

A. C. BAKER,
A. B. BAKER,
Solicitors for Plff.

Filed Mar. 31, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [16]

In the District Court of the United States for the District of Arizona.

No. E.-33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows, viz.:

That the defendant, The Norma Mining Company, a corporation organized and existing under the laws of the State of Arizona, for a valuable consideration, executed and delivered to the plaintiff, Hugh Mackay, a resident of the State of Colorado, residing in the City and County of said State, its promissory note for the principal sum of Sixteen Thousand Dollars ($16,000), bearing date the 2d day of August, A. D. 1913, and payable to the order of the plaintiff, Hugh Mackay, with interest from date at the rate of six per cent per annum, and that the said defendant executed and delivered its mortgage deed of even date with said promissory note conveying to the plaintiff the hereinafter described property to se-

cure the payment of said promissory note with interest thereon, together with the costs and expenses of his suit and a reasonable attorney's fee; and,

That later the said defendant executed and delivered to the plaintiff its two promissory notes bearing date the 31st day of March, A. D. 1914, one of said promissory notes being for the sum of Three Thousand Five Hundred Dollars ($3,500) and the other for One Thousand Five Hundred Dollars ($1,500), each of said notes bearing interest from date at the rate of seven per cent per annum and that at the time of the delivery of said notes and to secure the payment of the principal and interest thereon as therein mentioned, the defendant, The Norma Mining Company, executed and delivered to the plaintiff its mortgage deed, bearing even date with said promissory notes upon the property hereinafter [17] mentioned and that as consideration for said two last mentioned promissory notes, the plaintiff paid the sum of Four Thousand Dollars ($4,000), and that said mortgages are valid and subsisting liens against said mortgaged premises; and,

That the plaintiff, Hugh Mackay, is the present owner and holder of all three of the aforesaid promissory notes, and that there is due and owing to said plaintiff from the defendant upon the first of said promissory notes for principal and interest to this date, February 15, 1916, the sum of Eighteen Thousand Four Hundred Thirty-four Dollars and Sixty-six Cents ($18,434.66) and that there is due and owing to the plaintiff from the defendant on the last two of said notes for principal and interest to said last-

mentioned date the sum of Four Thousand Five Hundred Twenty-three Dollars and Forty-three Cents ($4,523.43); and,

That the sum of One Thousand Dollars ($1,000) is a reasonable fee herein for the attorney of said plaintiff; and,

That default has been made in the payment of the principal and interest of said promissory notes and the plaintiff is entitled to have said mortgages foreclosed and the property therein and hereinafter described sold and that the said mortgaged property and premises hereinafter described are so situated that they cannot be sold except as an entirety, due regard being had to the best interests of those interested in the same; and,

That the mortgaged premises mentioned in said Complaint and described as follows, to wit: the following patented mining claims situate, lying and being in the Indian Secret Mining District in the County of Mohave, and State of Arizona, viz.: The Putman, The Review, The West Half of The Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Acquarius, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R., The Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The Millsite, The Center, The Little Giant, The Midway, The Prince Albert, The Orient, The [18] Squattum, The Horn Silver, The Rip Van Winkle,

The African, The Norma, The Garfield, The Shaefer's Treasure, The Fraction Quartz, The Emma, The Nellie Blye, The Occident, The Junction, The G. A. R., and The Daisy Mining Claims, together with all the dips, spurs and angles, and all the metals, ores, gold and silver bearing quartz, rock and earth therein, the old dump now thereon, and together with the mill and machinery therein and the different hoisting plants on the property be sold to raise the amount due to the plaintiff for principal, interest, costs of suit, attorney's fees, fees and expenses of sale, subject to all taxes and assessments against said property, at public auction, to the highest and best bidder at the courthouse in the town of Kingman in the county of Mohave and State of Arizona, by the Special Master appointed to execute this decree after giving public notice of the time and place of said sale by publication of said notice, once a week for at least four weeks prior to said sale in at least one newspaper printed, regularly issued and having a general circulation in said county of Mohave and State of Arizona where the property to be sold is situated, and which Notice shall describe the property to be sold, and that the Special Master making such sale may either personally or by some person to be designated by him to act in his name or by his authority, adjourn the sale from time to time without further advertisement but only upon the request of the plaintiff or his solicitor or by order of the Court or a judge thereof; and,

That the plaintiff herein may become the purchaser at said sale and in case the said plaintiff shall become

such purchaser and shall bid no more than the amount of this decree, he may satisfy and make good his bid by paying any balance unpaid of the costs of suit, attorney's fees, fees and expenses of sale and delivering to said Special Master a receipt for such sum as shall equal the balance of his said bid and in case the said plaintiff shall bid more than the amount of this decree, he may make good his bid up to the amount of the decree in the manner aforesaid and the amount so bid in excess of the amount of the decree shall be paid in cash, and, **[19]**

That the said Special Master shall report his acts in the premises to the Court with all convenient speed and upon the sale of said premises being confirmed by the Court shall execute his Certificate of Purchase to the purchaser or purchasers thereof, which Certificate shall specify and describe the property purchased by such purchaser or purchasers, the sum bid therefor and the time when the purchaser or purchasers at such sale shall be entitled to a deed for the same if not redeemed as provided by law and said Special Master shall file in the office of the County Clerk and Recorder of said county of Mohave a duplicate of such Certificate of Purchase and out of the proceeds of said sale retain his fees and expenses of such sale after the same shall have been allowed by this court and pay to the officers of this court their costs and out of the remainder pay to the plaintiff his costs in this behalf laid out and expended to be taxed, including said attorney's fees and the sum of Twenty-two Thousand Nine Hundred Fifty-eight Dollars and Nine Cents ($22,958.09), together with

lawful interest thereon from this date to the date of such sale or if such remainder be insufficient to pay the whole of said amount last named with interest as aforesaid, then he shall apply said remainder to the extent to which it may reach and that the plaintiff shall have a judgment docketed against the defendant for any such deficiency, and that in case said premises shall sell for more than sufficient to pay the sums hereinbefore mentioned to be paid, then he shall, after making payments as aforesaid, bring such surplus money into court without delay to abide the further order thereof; and,

That Edwin F. Jones be and he is hereby designated and appointed Special Master to make the sale herein ordered and decreed and to execute and deliver a Certificate of Purchase to the purchaser or purchasers of said sale as aforesaid and a deed of conveyance to the property, the Court, however, reserving the right to appoint in term time or at Chambers another person, such Special Master with like powers in case of the death or disability to act of the Special Master hereby designated or in case of his resignation or failure to act or removal by the Court; and,

That the said defendant and all persons claiming or to claim [20] through or under it be forever barred and foreclosed of and from all equity of redemption and claim in and to said premises and every part and parcel thereof if the same are not redeemed according to the law of the State of Arizona, and if the same are not so redeemed, then and in that case, upon the production to the said Special Master or to

his successor, duly appointed as herein provided, of the Certificate of Purchase executed as aforesaid to the said Purchaser or Purchasers, the said Special Master or his successor shall make, execute and deliver to the said purchaser or purchasers, his or their representatives or assigns, a good and sufficient conveyance in fee-simple of the said premises and property, and that upon the execution and delivery of the conveyance aforesaid, the title to the said premises and property so conveyed shall be quieted in the purchaser or purchasers against said defendant, its successors and assigns and all persons claiming by, through or under it, them or either of them, and the said purchaser or purchasers or their representatives or assigns, shall be let into possession of the premises so conveyed and that the defendant or any person claiming by, through or under it, who may be in possession of said premises or any part thereof and any person who, since the commencement of this suit has come into possession under it on the production of said Special Master's Deed, shall surrender possession thereof to such purchaser or purchasers, their representatives or assigns.

Dated at Phoenix, this 18th day of March, A. D. 1916.

Done by the Court.

WM. H. SAWTELLE,
District Judge.

[Endorsed]: Filed Mar. 18, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [21]

Mandate U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the District of Arizona, GREETING:

[Seal]

Whereas, lately in the District Court of the United States for the District of Arizona, before you, or some of you, in a cause between Hugh Mackay, Plaintiff, and The Norma Mining Company, Defendant, No. E.–33 (Phx.), a decree was duly filed on the 18th day of March, A. D. 1916, in favor of the said plaintiff and against the said defendant, which said decree is of record and fully set out in the said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by the Norma Mining Company, as appellant and against Hugh Mackay, as appellee agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 1st day of March, in the year of our Lord, One Thousand Nine Hundred and Seventeen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted:

On Consideration Whereof, It is now here OR-

DERED, ADJUDGED AND DECREED by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ORDERED, ADJUDGED AND DECREED by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

(May 7, 1917.)

You, Therefore, are Hereby Commanded— [22]

That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of October, in the year of our Lord, one thousand nine hundred and seventeen.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

Amount of costs allowed and taxed in favor of the appellee and against the appellant as per annexed bill of items, taxed in detail: $28.45.

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

BILL OF ITEMS ANNEXED TO MANDATE PURSUANT TO SECTION 5, RULE 31.

Debit

Item No.	DEBIT ITEMS.	Dr.	Cr.
1	Docketing the Case and Filing the Record..................	5.00	
2	Entering 5 Appearances.......	1.25	
3	Entering 1 Continuance.......	.25	
4	Entering 4 Order..............	.80	
5	Filing 17 Papers..............	4.25	
6	Filing Briefs for Each Party Appearing (2)	10.00	
7	Filing Reply Brief of Appellee	5.00	
8	Filing		
9	Filing Argument		
10			
11	Transferring Cause on Printed Calendar (3)	3.00	
12	Drawing, Filing and Recording Decree or Judgment.....	1.65	
13			
14	Filing Petition for a Rehearing	5.00	
15			
16	Issuing		
17			
18			
19	Issuing Mandate, $5.00; Costs and Copy, $0.40.............	5.40	
20			
21	TOTAL MISCELLANEOUS COSTS	46.60	

22 Expense, Printing Record.....259.25
23 Expense, Printing Addenda to Do.......... .... 41.00

24 TOTAL OF DEBIT ITEMS..346.95

[23]

Credit

Item No.	CREDIT ITEMS.		
1	Deposited Account Misc. Costs R. E. Sloan..................		25.00
2	Addl. Deposited Account Misc. Costs R. E. Sloan............		6.95
3	Addl. Deposited Account Misc. Costs A. Sutro..............		6.20
4	Addl. Deposited Account Misc. Costs Robinson & Robinson...		5.00
5	Expense, Printing Record R. E. Sloan		259.25
6	Expense, Printing Addenda R. E. Sloan		41.00
7	TOTAL OF CREDIT ITEMS..		343.40
8	Balance, Costs Robinson & Robinson		3.45
	TOTALS............	346.85	346.85

ITEMIZED BILL OF COSTS ALLOWED AND TAXED.

Item No. Amount

1 Certified Cost of Transcript from Court Below:

2
3 Deposit —— Account Misc. Costs 5.00
4 Total Expense, Printing Record
5
6
7 Attorney's Docket Fee....................20.00
8 Balance Costs 3.45

TOTAL (Inserted in Body of Mandate)
TAXED AT 28.45

Attest: F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 2876. United States Circuit Court of Appeals, for the Ninth Circuit. The Norma Mining Company vs. Hugh Mackay. Mandate. Filed Oct. 22, 1917, at —— M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [24]

In the United States District Court for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

NORMA MINING COMPANY,

Defendant.

Motion for Order Setting Aside Sale, etc.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

Comes now the Norma Mining Company, by its attorney, Richard E. Sloan, and moves the Court that the sale of the premises mentioned and described in the decree entered in the above-entitled cause on the 18th day of March, 1916, made by the Special Master named therein on the —— day of ——, 1916, be ordered set aside and said Master be directed to readvertise and to resell said premises in the manner and mode and as provided in said decree.

In support of said motion said defendant represents to the Court that more than one year has elapsed since the said sale, and that the conditions at the time of said sale were less favorable for the sale of mining properties of the kind and character of those included in said decree than at present; that said mining claims are of the class of silver-bearing mines and that during the last few months silver properties have come into demand, owing to the rapid and phenomenal rise in the price of silver; that the plaintiff was the purchaser at said sale and the price named by him was the amount of said judgment and costs; that the defendant believes that if a resale of the premises be had, as herein requested, it may interest purchasers who will bid for said property in competition with the plaintiff.

Respectfully,

——————————. [25]

Service of a copy of within motion acknowledged this 25th day of October, 1917.

BAKER & BAKER.

[Endorsed]: Filed Oct. 26, 1917, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [26]

In the United States District Court for the District of Arizona.

MINUTE ENTRY OF DATE APRIL 9th, 1918.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Minutes of Court—April 9, 1918—Order Granting Motion to Set Aside Order of Sale, etc.

This cause coming on for hearing on the motion of defendant to set aside the sale of the premises mentioned in the decree of March 18th, 1916, and to resell same, A. C. Baker, Esquire, appearing on behalf of the plaintiff, and Richard E. Sloan, Esquire, appearing on behalf of the defendant, said motion is submitted to the Court, and having been duly considered by the Court, the same is by the Court sustained, with provision that the defendant pay Three Hundred Dollars within ten days to the clerk of this court or to plaintiff's counsel for the purpose of said resale. [27]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

NORMA MINING COMPANY,

Defendant.

Order Directing Special Master to Resell Property, etc.

The above-named defendant having filed its motion to vacate and set aside the sale heretofore made by the Special Master appointed under the decree entered in said cause, and the Court on the 9th day of April, 1918, having granted said motion upon the condition that the defendant deposit with the clerk of the court the sum of Three Hundred ($300) Dollars on or before April 19th, 1918, to cover the costs of such resale, and it now appearing that said defendant did, as required in said order, deposit said sum with the said clerk within said time,—

IT IS NOW ORDERED that the sale made under said decree by said Special Master on the 18th day of May, 1916, to be set aside, and said Special Master is ordered to resell the property in the manner and mode provided in said decree and according to the law.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Filed April 27, 1918. Mose Drachman, Clerk. [28]

In the District Court of the United States for the District of Arizona.

No. E.–33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Master's Report of Sale.

The undersigned respectfully reports that under the decree made and entered in said cause on the 18th day of March, 1916, and the order of the Court, ordering a resale of said property, of date April 27, 1918; he did on the 12th day of June 1918, offer for sale the property mentioned in said decree after having duly advertised said sale in the "Mohave County Miner," a weekly newspaper published in the Town of Kingman, in the County of Mohave, said property was offered for sale at the courthouse door in the town of Kingman, County of Mohave, and at said sale the plaintiff, Hugh Mackay became the purchaser, he being the highest, best and last bidder at and for the sum of Twenty-seven Thousand Five Hundred and Seventy-four Dollars and Twenty-eight Cents ($27,574.28).

That the Master incurred the following expenses in the execution of said Decree:

Publication of notice of sale.......$ 34.69
Expenses of Master in going to and returning from Kingman.......$ 86.80

$121.49

That the plaintiff offers to pay any balance remaining due upon the expenses and the costs now due in said cause, and to credit his judgment with the remainder of his said bid.

The Master hereby reports his doings under said decree and order and asks that his compensation be fixed by the Court and that the sum of Three Hundred Dollars deposited by the defendant under the provisions of said order of April 27, 1918, be declared subject to the costs and expenses of the said sale, and that upon the payment by the [29] plaintiff of the remainder of said costs and expenses, if any, he be authorized to make and file with the Recorder of Mohave County, a certificate of purchase in favor of the plaintiff, and that upon the expiration of the statutory period, he be authorized to make, execute, and deliver, a deed conveying to plaintiff all the right, title and interest of the defendant in and to the property sold.

The undersigned attaches the affidavit of publication showing that said notice was published on May 11, May 18, May 25, June 1, and June 8, 1918.

Respectfully submitted,

EDWIN F. JONES.

PROOF OF PUBLICATION.

State of Arizona,
County of Mohave,—ss.

J. H. Smith, being first duly sworn, says: I am 30 years of age; that during the publication of the notice, as herein mentioned, I was and now am the manager of the "Mohave County Miner," a weekly newspaper published on Saturday of each and

every week at the town of Kingman, in said county.

That said newspaper was printed and published as aforesaid on the following dates, to wit: Saturday, May 11, 1918; Saturday, May 18, 1918; Saturday, May 25, 1918; Saturday, June 1, 1918; Saturday, June 8, 1918.

That the Special Master's sale of which the annexed clipping is a printed and true copy was printed and inserted in each and every copy of said newspaper printed and published on the dates aforesaid, and in the body of said newspaper and not in a supplement thereto.

J. H. SMITH.

Subscribed and sworn to before me this 12th day of June, 1918.

[Seal] ANSON H. SMITH,
U. S. Commissioner. **[30]**

In the District Court of the United States for the District of Arizona.

No. E.–33 (PHX.).

HUGH MACKAY,
Plaintiff,

vs.

THE NORMA MINING COMPANY,
Defendant.

Notice of Resale by Special Master.

Under and by virtue of a decree made and entered in said cause on the 18th day of March, 1916, and of an order made and entered in said cause on the 27th day of April, 1918, the undersigned, as Special

Master, will offer for sale to the highest bidder for cash, at the courthouse door of Mohave County, in the town of Kingman, Mohave County, Arizona, between the legal hours of sale on Wednesday, the 12th day of June, 1918, all the right, title and interest which the defendant, The Norma Mining Company, have in and to the following described property lying in the county of Mohave, State of Arizona, to wit, the following patented mining claims situate, lying and being in the Indian Secret Mining District in the county of Mohave, State of Arizona, viz.:

The Putman
The Bonita
The Monster
The Garfield Fraction
The Western View
The Desert Prospect
The G. A. R. Fraction
The Nora R.
The Abe Lincoln
The Center
The Prince Albert
The Horn Silver
The Norma
The Fraction Quartz
The Occident
The Daisy Min. Claim
The Review
The Mountain Scenery
The Peer
The Acquarius
The Lone Star
The Goad Stick
The Oversight
The Big Joshua
The Ellington
The Little Giant
The Orient
The Rip Van Winkle
The Garfield
The Emma
The Junction
The W. Half of Hulda
The Chief of the Hill
The Midway Extension
The Grand Central
The Blind Goddess
The Norma Fraction
The Buckley
The Lookout
The Millsite

The Midway	The Schaefer's Treasure
The Squattum	The Nellie Blye
The African	The G. A. R.

—together with all the dips, spurs and angles and all the metals, ores, gold and silver-bearing quartz, rock and earth therein, the old dump now thereon, together with the mill and machinery therein, and the [31] different hoisting plants on the property.

Said property is sold to raise the amount due to the plaintiff for principal, interest, costs of suit, attorney's fees, and fees and expenses of sale, and is sold subject to all taxes and assessments against said property, said debt amounting to the sum of Twenty-two Thousand Nine Hundred and Fifty-eight Dollars and Nine Cents ($22,958.09) with interest from March 18, 1916, the date of the decree.

Said sale shall be for cash and shall be free from all equity of redemption except the statutory right of redemption provided by the laws of the State of Arizona.

Dated May 4, 1918.

EDWIN F. JONES,
Special Master.

First insertion May 11—last June 8, 1918, up.

[Endorsed]: Filed July 8th, 1918. Mose Drachman, Clerk. [32]

In the District Court of the United States for the District of Arizona.

No. E.–33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Order Confirming Resale.

This cause coming on to be heard upon the report of the Master of the sale of the said property, and no exceptions or objections having been filed to said report which was filed in this court on the 7th day of July, 1918, and more than twenty days having elapsed since the filing of said report, it is ordered, adjudged and decreed:

1. That said report be and is hereby in all things, confirmed.

2. That the expenses of said sale, including the Master's expenses in going to and from the place of sale, is fixed at the sum of One Hundred and Twenty-one Dollars and Forty-nine cents ($121.49).

3. That the compensation of the Master is fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

4. That the clerk of this court will retain, out of the money now in his hands the amount of clerk's costs due and remaining unpaid, and that after retaining such fees he pay to the Master, for his ex-

penses and compensation the remainder of the money now in his hands, and it appearing that the same will be insufficient to pay said compensation and expenses the plaintiff is hereby required to pay to the Master the balance so remaining unpaid.

5. That the Master, if requested so to do by the plaintiff shall prepare and file with the Recorder of Mohave County, a certificate of sale of the property mentioned in the decree, and that upon the expiration of the statutory period from the date of sale that the Master made, execute and deliver to the purchaser at said sale, a deed conveying to said purchaser all the right, title and interest of any of the parties to this suit in and to the property embraced in said [33] decree.

Done in open court this 23d day of September, 1918.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed Sep. 23, 1918, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [34]

In the District Court of the United States for the District of Arizona.

No. E.-33 (PHX.).

HUGH MACKAY,

Complainant,

vs.

THE NORMA MINING COMPANY,

Defendant.

Order Nisi Confirming Sale.

The report of Edwin F. Jones, heretofore appointed Special Master to make the sale heretofore ordered and decreed, having been duly filed, and it appearing therefrom that said Special Master duly struck off and sold as one parcel, and as an entirety, the whole of the properties of every sort and description of the Norma Mining Company, said defendant, and mentioned and described in the decree made and entered in said cause on the 18th day of March, 1916, for the sum of Twenty-seven Thousand Five Hundred and Seventy-four and Twenty-eight cents ($27,574.28), to Hugh Mackay, the said complainant.

It is on motion of said complainant, Hugh Mackay, ordered that said report and sale be confirmed, unless cause to the contrary thereof be shown in eight (8) days after notice to the parties to the several bills of complaint in this cause, or their solicitors, of the filing of said report.

Dated: October 7, 1918.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed Oct. 7/18. Mose Drachman, Clerk. [35]

In the District Court of the United States for the District of Arizona.

No. E.-33 (PHX.).

HUGH MACKAY,

Complainant,

vs.

THE NORMA MINING COMPANY,

Defendant.

Notice of Filing Special Master's Report of Sale of Property, and Nisi Order Confirming the Sale.

To the Defendant, The Norma Mining Company, and Its Solicitor, Richard E. Sloan:

You will please take notice that the Report of the Special Master on the sale of the defendant's properties, in the above-entitled cause, was filed in this court on July 8th, 1918, a copy of which report is hereunto annexed, and marked Exhibit "A."

You will take further notice that the Court, on the 7th day of October, 1918, made an order Nisi confirming such sale, a copy of which said order is hereunto annexed, marked Exhibit "B," and that the complainant will move the Court in eight days after the service hereof upon you for a final order confirming said sale.

A. C. BAKER,

Attorney for Complainant.

(Exhibit "A.").

In the District Court of the United States for the District of Arizona.

No. E.–33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

MASTER'S REPORT OF SALE.

The undersigned respectfully reports that under the decree made and entered in said cause on the 18th day of March, 1916, and [36] the order of the court, ordering a resale of said property, of date April 27, 1918, he did on the 12th day of June, 1918, offer for sale the property mentioned in said decree after having duly advertised said sale in the "Mohave County Miner," a weekly newspaper, published in the town of Kingman, in the County of Mohave, said property was offered for sale at the courthouse door in the town of Kingman, county of Mohave and at said sale the plaintiff, Hugh Mackay became the purchaser, he being the highest, best and last bidder at and for the sum of Twenty-seven Thousand Five Hundred and Seventy-four Dollars and Twenty-eight cents ($27,574.28).

That the master incurred the following expenses in the execution of said Decree:

Publication of notice of sale	$ 34.69
Expenses of Master in going to and returning from Kingman	86.80
	$121.49

That the plaintiff offers to pay any balance remaining due upon the expenses and the costs now due in said cause, and to credit his judgment with the remainder of his said bid.

The Master hereby reports his doings under said decree and order and asks that his compensation be fixed by the Court and that that sum of Three Hundred Dollars deposited by the defendant under the provisions of said Order of April 27, 1918, be declared subject to the costs and expenses of the said sale, and that upon the payment by the plaintiff of the remainder of said costs and expenses, if any, he be authorized to make and file with the Recorder of Mohave County, a certificate of purchase in favor of the plaintiff, and that upon the expiration of the statutory period, he be authorized to make, execute and deliver, a deed conveying to plaintiff all the right, title and interest of the defendant in and to the property sold.

The undersigned attaches the affidavit of publication showing that said notice was published on May 11th, May 18, May 25, June 1, and June 8, 1918.

Respectfully submitted,

EDWIN F. JONES. [37]

Proof of publication attached.

[Endorsed]: Filed July 8th, 1918. Mose Drachman, Clerk.

Exhibit "B."

In the District Court of the United States for the District of Arizona.

No. E.-33 (PHX.).

HUGH MACKAY,

Complainant,

vs.

THE NORMA MINING COMPANY,

Defendant.

ORDER NISI CONFIRMING SALE.

The report of Edwin F. Jones, heretofore appointed Special Master to make the sale heretofore ordered and decreed, having been duly filed, and it appearing therefrom that said Special Master duly struck off and sold as one parcel, and as an entirety, the whole of the properties of every sort and description of the Norma Mining Company, said defendant, and mentioned and described in the decree made and entered in said cause on the 18th day of March, 1916, for the sum of Twenty-seven Thousand Five Hundred and Seventy-four and Twenty-eight cents ($27,574.28), to Hugh Mackay, the said complainant.

It is on motion of said complainant, Hugh Mackay, ordered that said report and sale be confirmed, unless cause to the contrary thereof be shown in eight (8) days after notice to the parties to the several bills of complaint in this cause, or their colicitors, of the filing of said report.

Dated October 7, 1918.

WILLIAM H. SAWTELLE,
Judge. [38]

Copies of the within papers acknowledged this 7th day of Oct., 1918.

RICHARD E. SLOAN,
Atty. for Defendant.

[Endorsed]: Filed Oct. 7/18. Mose Drachman, Clerk. [39]

In the United States District Court for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

NORMA MINING COMPANY,

Defendant.

Exceptions to and Motion to Set Aside Sale of Property.

To the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona.

Comes now the Norma Mining Company, by its attorney, Richard E. Sloan, and moves the Court that the sale of the premises mentioned and described in the decree entered in the above-entitled cause on the 18th day of March, 1916, made by the Special Master named therein on the 12th day of June, 1918, be ordered set aside and said Master be directed to advertise and resell said premises in the

manner and mode as provided in said decree, and that said sale be made not earlier than six months from date hereof.

In support of said motion, said defendant represents to the court that the notice of said sale published in the "Mohave County Miner," a weekly newspaper published in the town of Kingman, county of Mohave, State of Arizona, did not give to the public sufficient notice of the time set for said sale in this, that said advertisement recited that the property mentioned in said decree would be offered for sale to the highest bidder for cash "between the legal hours of sale on Wednesday the 12th day of June, 1918."

That by said advertisement the public had no way of ascertaining at what hour in said day said property would be offered for sale; that said manner of advertising said sale was unfair for the reason that it did not give sufficient opportunity for open and competitive [40] bidding.

That said notice of sale did not describe the property to be sold, particularly as to the machinery and equipment located on said property. There was at the time set for said sale, and is now located on said property, and a part of the property sought to be sold, a large amount of very valuable machinery and equipment, which alone, defendant believes, is of the value of more than One Hundred Thousand ($100,000) Dollars. That the said machinery and equipment was not described in said notice with sufficient certainty or definiteness to enable the public to ascertain therefrom any conception of the character

or value of said property, nor was it described in any manner whatsoever in said notice.

That the decree under which said Special Master sought to sell said property directed said Special Master to describe in the notice of sale the property sought to be sold.

That at the time said sale was made the public was being importuned and urged by the Federal Government to invest all surplus moneys in Government bonds and other war necessities, and the Federal Government at said time discouraged the organization and promotion of new enterprises not necessary to the conduct of the war, and as a result of this policy on the part of the Government, and the condition of the money market arising therefrom, it was at said time very difficult to interest anyone in the purchase of said property. That the price bid for said property, to wit, the sum of Twenty-seven Thousand Five Hundred and Seventy-four and Twenty-eight One Hundredths ($27,574.28) Dollars, was a grossly inadequate price. That in support of defendant's claim that such price was inadequate, defendant presents herewith, the affidavit of Mr. A. Lefave, a man familiar with the character and value of said property and qualified by experience and training to testify as to the reasonable value thereof, which said affidavit fixes the value, in the year 1916, at a sum in excess of One Hundred Thousand ($100,000) Dollars. That since the date of said affidavit the value of silver mining property, as well as the value of [41] all kinds of mining machinery and equipment has greatly increased.

That all the facts and circumstances hereinabove set forth had a tendency to cause said inadequacy of price. That by reason of the fact that the Federal Government is demanding that all surplus moneys on hand be invested in Government bonds and other necessary war purposes, and that this condition is likely to continue for at least six months, it is unfair and unjust to the defendant herein, that said property should be sold within six months therefrom.

That the plaintiff was the purchaser at said sale and the price named herein was the amount of said judgment and costs. That the defendant believes that if a resale of the premises be had at the time hereinabove mentioned, or subsequent thereto, it may interest purchasers who will bid for said property in competition with said plaintiff.

Respectfully,

RICHARD E. SLOAN,
Attorney for Defendant.

[Endorsed]: Received copy of within this 15th day of Oct., 1918.

A. C. BAKER.
By B. CHAMBERS.

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

County of Maricopa,
State of Arizona,—ss.

A. Lafave, being first duly sworn, deposes and says that he resides at Clifton, State of Arizona; that he has been a resident of the State of Arizona for more than twenty years last past; that he is engaged in the business of mining and has been so engaged for the past [42] thirty-seven years; that he is acquainted with the property of the Norma Mining Company, being the same property described in the decree of foreclosure entered in the above-entitled cause, situated in the Indian Secret Mining District, county of Mohave, State of Arizona; that he at one time was Superintendent and in charge of the operations of the White Hills Mining & Milling Company, the predecessor in interest of The Norma Mining Company in the ownership of said property; that the mining property is of the class of property known as "gold and silver bearing"; that prior to and including the time when affiant was in charge of said property it had produced more than One Million Dollars, and as affiant is informed and believes, it has since produced a large sum in addition; that from affiant's knowledge of this property, and of mining properties generally, he is able to state with reasonable certainty that the reasonable market value of said property is in excess of One Hundred Thousand Dollars.

A. LAFAVE.

Subscribed and sworn to before me this 20th day of May, 1916.

[Seal] O. T. RICHEY,

Notary Public.

My commission expires April 25th, 1918.

[Endorsed]: Filed Oct. 15, 1918, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. **[43]**

In the United States District Court for the District of Arizona.

No. E.-33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

NORMA MINING COMPANY,

Defendant.

Order Confirming Sale.

This cause come on to be heard on the Report of the Special Master of Sale, made pursuant to order of April 27, 1918, and the exceptions of the defendant thereto and its motion for resale of the properties mentioned in the decree, A. C. Baker appearing for the plaintiff, and R. E. Sloan, Esq., appearing for the defendant, and after hearing the matter and considering the same,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREE that the exceptions of the defendant to the Special Master's Report of Sale, and its motion for resale, are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Report of the Special Master of Sale is in all things confirmed and approved.

Dated October 19, 1918.

WM. H. SAWTELLE,
Judge.

Receipt of copy of the within instrument acknowledged this 19th day of Oct., 1918.

R. E. SLOAN,
Atty. for Defendant.

[Endorsed]: Filed Oct. 19, 1918. Mose Drachman, Clerk. [44]

In the United States District Court for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

NORMA MINING COMPANY,

Defendant.

Order Discharging Cost Bond.

In this case the plaintiff, Hugh Mackay, under the order of the Court, having filed a cost bond in the sum of $300, with H. D. Marshall and M. C. McDougal, as sureties, the said bond being conditioned that plaintiff would pay all costs that might be recovered against him in said action by the defendant, and the said plaintiff himself having recovered judgment in the case against the defendant, and all costs

in said case being fully paid, and the said case being finally disposed of,

NOW, IT IS ORDERED that said cost bond be discharged, and that the principal and sureties on said bond be and they are hereby released from all liability thereon.

Dated December 2d, 1918.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed Dec. 2, 1918. Mose Drachman, Clerk. [45]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,
Plaintiff,

vs.

THE NORMA MINING COMPANY,
Defendant.

Petition for Appeal.

To the Honorable W. B. GILBERT, Judge of the Circuit Court of Appeals.

The above-named, The Norma Mining Company, feeling aggrieved by the order confirming sale rendered and entered in the above-entitled cause on the 19th day of October, 1918, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as

provided by law and that a transcript of the record proceedings and documents, upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided; and your petitioner further prays that the proper order relating to the required security to be required of it, be made.

Dec. 28, 1918.

GRANT H. SMITH,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [46]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal of the above-entitled cause from the order confirming sale, made by the United States District Court, for the District of Arizona, on the 19th day of October, 1918.

1.

That the United States District Court, for the District of Arizona, erred upon the hearing of the motion to confirm said sale in overruling defendant's motion to set aside said sale, as follows: Under the exceptions to said sale, filed by the defendant, said defendant represented to the Court that the notice of said sale published in the "Mohave County Miner," a weekly newspaper published in the town of Kingman, county of Mohave, State of Arizona, did not give sufficient notice of the time and place of said sale. In support of said contention, the defendant showed by the affidavit of publication of said notice that the said notice failed to fix any hour during the 12th day of June, 1918, the day said property was advertised to be sold, at which said sale would be made.

2.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale as follows: That in support of said motion to set aside said sale, [47] the defendant showed to said Court that the notice of sale published by the plaintiff, as aforesaid, did not describe the property to be sold with sufficient certainty or definiteness to enable the public to ascertain therefrom the character and value of said property, and that the machinery and equipment thereon was not described in any manner whatever in said notice.

3.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion

to set aside said sale, as follows: That in support of said motion to set aside said sale, the defendant showed to the said Court that the price bid for said property, to wit, the sum of $27,574.28 was grossly inadequate and that said price did not exceed twenty-five per cent of the actual value of said property, and that the actual value of said property was greatly in excess of One Hundred Thousand Dollars.

4.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale, as follows: That the defendant, in support of said motion, showed to said Court that at the time said sale was made the public was being importuned and urged by the Federal Government to invest all surplus moneys in Government bonds and other war necessities and the Federal Government at said time discouraged the organization and promotion of new enterprises not necessary to the conduct of the war. That as a result of said policy on the part of the Government, and the condition of the money marke*d* arising therefrom, it was at said time very difficult to interest anyone in the purchase of said property.

5.

That the United States District Court, for the District of Arizona, erred in overuling defendant's motion to set aside the sale herein. [48]

6.

That the United States District Court, for the District of Arizona, erred in entering its order confirming the sale herein.

7.

That the United States District Court, for the District of Arizona, erred in entering its order confirming a sale herein, because it affirmatively appears from the record herein that said sale was prematurely made under the order of sale and the rules of this court.

WHEREFORE, appellant prays that said order confirming sale be reversed and that said District Court for the District of Arizona be ordered to grant a resale of said property as prescribed by law.

Dec. 28, 1918.

GRANT H. SMITH,
Attorney for Defendant.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [49]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Order for the Allowance of an Appeal.

Upon the presentation of the petition of counsel for appellant, asking for the allowance of an appeal from the final order entered herein on October 19, 1918, in favor of plaintiff and against defendant, and

from an order made and entered herein on October 19, 1918, denying the defendant's motion to vacate and set aside said order,—

IT IS ORDERED that such appeal be, and the same is hereby, allowed. Appellant will file a bond on appeal in the sum of $250 (Two Hundred and Fifty Dollars).

Dated this 28th day of December, 1918.

Bond to be filed within 10 days from date hereof.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. **[50]**

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Order Extending Time to January 15, 1919, to File Bond on Appeal.

IT IS ORDERED that the time of the defendant in the above-entitled cause, to file a bond on appeal,
15th
be extended until January ~~20,~~ 1919.

Dated January 7, 1919.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [51]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Order Extending Time to January 28, 1919, to File Bond on Appeal.

IT IS ORDERED that the time of the defendant in the above-entitled cause, to file a bond on appeal, be extended until January 28, 1919.

Dated January 14, 1919.

W. H. HUNT,
Circuit Judge.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [52]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, The Norma Mining Company, a corporation, as principal, and Thomas J. Curran and C. S. Boden, as sureties, are held and firmly bound unto Hugh Mackay, the above-named plaintiff, in the sum of Two Hundred and Fifty Dollars, lawful money of the United States, to be paid to him and unto his heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 7th day of January, 1919.

Whereas, the above-named, The Norma Mining Company, has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the decree of the District Court for the District of Arizona in the above-entitled cause.

Now, therefore, the condition of this obligation is such that if the above-named, The Norma Mining Company, shall prosecute its said appeal to effect and shall answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect. [53]

[Seal] THE NORMA MINING COMPANY,

By R. T. ROOT,

President.

THOMAS J. CURRAN.

C. S. BODEN.

State of California,
City and County of San Francisco,—ss.

On this seventh day of January, 1919, personally appeared before me Thomas J. Curran, of Oakland, Alameda Co., and C. S. Boden, of Palo Alto, Santa Clara Co., known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, each of whom separately acknowledged to me that he executed the same as his own free act and deed for the uses and purposes therein set forth.

Thomas J. Curran C. S. Boden

J. F. McC N.P. And the said Curran and Boden, being by me duly sworn, separately, says that he is a resident and householder of the City and of Oakland, Alameda Co. Palo Alto, Santa Clara Co. J. F. McC N.P. ~~County of San Francisco,~~ State of California, and that he is worth the sum of $250 over and above his just debts and liabilities, exclusive of property exempt from execution.

THOMAS J. CURRAN.
C. S. BODEN.

Subscribed and sworn to before me this 7th day of January, A. D. 1919.

[Notarial Seal] JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

Above bond approved Jany. 14, 1919.

WM. H. HUNT,
Judge.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [54]

In the District Court of the United States for the District of Arizona.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Sir: I herewith file with you in the above-entitled action petition for appeal, assignment of errors, order for the allowance of an appeal, two orders extending time in which to file bond on appeal, and bond on appeal, duly approved by Judge William H. Hunt, Circuit Judge, and citation on appeal.

You will please prepare a record on appeal, and include therein the bill of complaint, the amended answer, and cross-bill of The Norma Mining Company, the decree, the order of the Circuit Court of Appeal, affirming the judgment of the lower court on appeal, and all documents and papers filed or otherwise placed of record in the clerk's office since the filing of the remittitur on appeal. Also copies of all minute orders appearing on the clerk's records in connection with said case since the remittitur on appeal

was filed. Also copies of the instruments herewith filed in your office.

GRANT H. SMITH,
Attorney for Defendant.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [55]

In the United States District Court for the District of Arizona.

No. E.-33 (PHOENIX).

HUGH MACKAY,
Plaintiff (Appellee).

vs.

THE NORMA MINING COMPANY,
Defendant (Appellant).

Certificate of Clerk of United States District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing fifty-five (55) pages, numbered from one (1) to fifty-five (55), inclusive, constitutes a full true, correct and complete transcript of so much of the record, papers and other proceedings in the above-entitled cause as are necessary to the hearing of said cause, and as are specified and designated in the praecipe filed herein by the above-

named defendant-appellant, as appears from the original records and files thereof now remaining in my custody and control.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendant-appellant for the preparation and certification of the transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: **[56]**

Clerk's fee for preparing transcript of record—140 folios at 10 cents per folio.......	$14.00
Certificate of Clerk to transcript of record—4 folios at 15 cents per folio..............	.60
Seal affixed to said Certificate.............	.20
Total.........	$14.80

I hereby certify that the above cost for preparing and certifying record, amounting to Fourteen and 80/100 Dollars, ($14.80), has been paid to me by Grant H. Smith of counsel for defendant-appellant.

I further certify that I hereto attach and herewith transmit the original citation in this cause.

WITNESS my hand and the seal of said District Court, affixed at my office in Phoenix, Arizona, this 26th day of March, A. D. 1919.

[Seal] MOSE DRACHMAN,
Clerk.
By Nat. T. McKee.
Deputy Clerk. **[57]**

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hugh Mackay, Plaintiff, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, made by the undersigned Circuit Judge for the Ninth Circuit, District of Arizona, wherein the Norma Mining Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Judicial Circuit, this 28th day of December, A. D. 1918.

WM. H. HUNT,

United States Circuit Judge. [58]

United States of America,—ss.

On this —— day of January, in the year of our Lord one thousand nine hundred and nineteen, personally appeared before me, ———, the subscriber, and makes oath that he delivered a true copy of the within citation to Messrs. A. C. Baker and A. B. Baker, attorneys for plaintiff in the above-entitled action, on the —— day of January, 1919.

Subscribed and sworn to before me at ———, this ——— day of January, A. D. 1919.

———————————

———————————

Service of the within citation is hereby acknowledged this 18th day of January, 1919.

BAKER & BAKER,
Attorneys for Plaintiff,
By L. L. PIERSON.

[Endorsed]: No. ———. United States District Court for the District of Arizona. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee. Citation on Appeal. Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy.

———

[Endorsed]: No. 3319. United States Circuit Court of Appeals for the Ninth Circuit. The Norma Mining Company, a Corporation, Appellant, vs Hugh Mackay, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed March 28, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien.
Deputy Clerk.

Plaintiff's Exhibit "B" for Identification—Realty Mortgage, Between The Norma Mining Company and Hugh Mackay, August 2, 1913.

REALTY MORTGAGE.

Know All Men by These Presents:

That the Norma Mining Company, a corporation duly organized and existing under the laws of the State of Arizona, Mortgagor, ~~of~~ —— ~~County of~~ —— State of Arizona, for and in consideration of Sixteen Thousand ($16,000) Dollars, to it in hand paid by Hugh Mackay, Mortgagee, has granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Hugh MacKay all that certain premises described as follows, to wit: The following Mining Claims situate, lying and being in the Indian Secret Mining District, in the County of Mohave, and State of Arizona, viz.: The Putman, The Review, The West Half of The Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Acquarius, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R., The Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The Hillsite, The Center, The Little Giant, The Midway, The Prince Albert, The Orient, The Squattum, The Horn Silver, The Rip Van Winkle, The African, The Norma, The Garfield, The Schaefer's Treasure, The Fraction Quartz, The

Emma, The Nellie Blye, The Occident, The Junction, The G. R. A., and The Daisy Mining Claims, together with the mill and machinery therein and the different hoisting plants upon the property. To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Hugh Mackay, Mortgagee, his heirs and assigns forever.

This Conveyance is intended as a Mortgage to secure the payment of one certain Promissory Note, given by the said Mortgagor of date August the second, A. D. 1913, which said note is in words and figures following, to wit:

$16,000. Denver, Colo., Aug. 2d. 1913.

Four months after date The Norma Mining Co. promises to pay to the order of Hugh Mackay Sixteen Thousand Dollars at Denver, Colo.

Value received with interest at six per cent per annum.

THE NORMA MINING CO.
By R. T. ROOT,
President.

In executing this instrument the Mortgagor reserves the right to mine ore and to operate this property in the usual and customary way of mining and operating such property, taking and using any and all proceeds, incomes and profits from said property as fully and to the same extent as if this indenture had not been made, until the property may be sold and conveyed under this mortgage by reason of default of the payment provided herein, in event that such default should occur.

This instrument is hereby executed and delivered by R. T. Root, as president, by order of the Board of Directors of this company and said execution and delivery is duly ratified by a meeting of the stockholders of the company at which all shares of stock issued was represented and unanimously voted in favor thereof.

And this instrument shall be void if said Promissory Note, principal and interest be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said Promissory Note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said Promissory Note mentioned, then, and in such case, the principal sum of said Note and the interest thereon shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said Mortgagee his heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said Note or on this Mortgage and Note: and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said Mortgagee his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, attorneys fees not exceeding —— per cent thereon upon the amount found due the plaintiff on said Note and this Mortgage, or in case of settlement after suit brought, but before judgment rendered, then —— per cent on amount found due at the time of settlement, as well as all payments that

the said Mortgagee heirs, executors, administrators or assigns may be obliged to make for —— security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Executed this second day of August, A. D. 1913.

THE NORMA MINING COMPANY. [Seal]

[Corporate Seal] By R. T. ROOT,

President.

Signed, sealed and delivered in the presence of

J. M. CLEMENTS.

State of California,

County of Los Angeles,—ss.

On this 2d day of August, A. D. 1913, before me, Ina Evershed, a notary public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared R. T. Root known to me to be the President of the Norma Mining Company, the Corporation that executed the within Instrument, known to me to be the person who executed the within Instrument, on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same as its free act and deed for the purposes therein expressed and that the same was by him voluntarily executed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] INA EVERSHED,

Notary Public in and for said County, State of California.

[Endorsed]; No. ——. Realty Mortgage. The Norma Mining Company to Hugh Mackay. Dated ————, 189—. Filed and recorded at request of Robinson and Robinson, August 29th, A. D. 1914, at 9 o'clock A. M. Book 4 of Mortgages, pages 172, 173. J. W. Morgan, County Recorder. Marked Plff. Ex. "B" for identification. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E.-6—Prescott. Hugh MacKey vs. Norma Mining Co.

Plaintiff's Exhibit "E"—Mortgage, March 31, 1914, Between The Norma Mining Company and Hugh Mackay.

This Indenture, made the thirty-first day of March in the year one thousand nine hundred and fourteen between THE NORMA MINING COMPANY, a corporation duly organized and existing under the laws of the State of Arizona, party of the first part, and HUGH MACKAY, of the City and County of Denver, State of Colorado, party of the second part:

Whereas, the said NORMA MINING COMPANY, party of the first part, is justly indebted to the said party of the second part, in the sum of Five Thousand ($5,000) Dollars, lawful money of the United States, secured to be paid by two notes or obligation, bearing even date herewith, conditioned for the payment of the said sum of Five Thousand ($5,000) Dollars, one note for Fifteen Hundred ($1,500) Dollars and one note for Thirty-five Hundred (3,500) Dollars, payable on or before

May 1st, 1914, with interest at the rate of seven per cent (7%) per annum.

It being expressly agreed, that the whole of the said principal sum shall become due after default in the payment of interest, taxes or assessments, as hereinafter provided.

Now this Indenture Witnesseth, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar paid by the said party of the second part, the receipt of which is hereby acknowledged, do hereby grant and release unto the said party of the second part, and to his heirs and assigns forever, All the following described patented mining claims, situate, lying and being in the County of Mohave and State of Arizona, to wit: in Indian Secret Mining District in said Mohave County, Arizona, viz: The Putman, the Review, the West Half of the Hulda, the Bonita, the Mountain Scenery, the Chief of the Hill, the Monster, the Peer, the Midway Extension, the Garfield Fraction, the Acquarins, the Grand Central, the Western View, the Lone Star, the Blind Goddess, the Desert Prospect, the Goadstick, the Norma Fraction, the G. A. R. Fraction, the Oversight, the Buckley, the Nora R., the Big Joshua, the Lookout, the Abe Lincoln, the Ellington, the Hillsite, the Center, the Little Giant, the Midway, the Prince Albert, the Orient, the Squattum, the Horn Silver, the Rip Van Winkle, the African, the Norma, the Garfield, the Schaefer's Treasure,

the Fraction Quartz, the Emma, the Nellie Blye, the Occident, the Junction, the G. A. R., and the Daisy Mining Claim; together with all the dips, spurs and angles, and all the metals, ores, gold and silver bearing quartz, rock and earth therein, the old dump now thereon, and together with the mill and machinery therein and the different hoisting plants on the property.

Until default shall be made in payments of principal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed, and every part and percel thereof, with the full right and privilege of developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property, and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made.

The execution of this mortgage was duly authorized by a meeting of the stockholders of said The Norma Mining Company at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a resolution

authorizing the execution and delivery hereof, and was also authorized by a resolution of its Board of Directors duly adopted by unanimous vote at a meeting at which all of the directors of said Company were present.

Together with the appurtenances, and all the estate and rights of the party of the first part, in and to the said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

There is a mortgage by aforesaid Grantor to aforesaid Grantee on said property for Sixteen Thousand ($16,000) Dollars, and some taxes, all of which the Grantor will pay.

Provided always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine, and be void.

And the said party of the first part covenants with the party of the second part as follows:

First.—That the party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises herein described, according to law.

Second.—That the said party of the first part will

execute any further necessary assurance of the title to said premises and will forever warrant said title.

Thirs.—~~That the party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee.~~

Fourth.—And it is hereby expressly agreed that the whole of said principal sum shall become due and payable as provided in said notes.
~~at the option of the said party of the second part after default in the payment of interest for —— days, or after default in the payment of any taxes or assess-~~
on
~~ment for —— days after notice and demand.~~

In Witness Whereof, the said party of the first part, The Norma Mining Company, has hereunto caused these presents to be signed by its President and attested by its Secretary and the seal of said Company to be hereto affixed this thirty-first day of March, A. D. 1914.

THE NORMA MINING COMPANY. (Seal)
By R. T. ROOT, (Seal)
President.

[Corporate Seal] W. W. ROOT,
Secretary.

State of New York,
County of New York,—ss.

Before me, Geo. F. Brelsford, a Notary Public, in and for said County and State, on this day personally appeared R. T. Root, known to me to be the President of The Norma Mining Company, the Corporation described in the foregoing instrument, and known to me to be the person whose name is subscribed to the foregoing instrument as President of

said Company, and, as such Officer, acknowledged to me that he executed the said instrument for said Corporation for the purpose and consideration therein expressed, as the free act and deed of said Corporation and that it was by him voluntarily executed.

Given under my hand and seal of office this 31st day of March, A. D. 1914.

My commission expires March 30, 1916.

[Notarial Seal] GEO. F. BRELSFORD,
Notary Public New York County, #239, N. Y.
Register No. 6230.

[Endorsed]: The Norma Mining Company to Hugh Mackay. Mortgage. Filed and recorded at request of Robinson and Robinson August 29th, A. D. 1914, at 9 o'clock A. M., in Book 4 of Mortgages, pages 170 et seq., Records of Mohave County, Arizona. J. W. Morgan, County Recorder. Marked Plff. Ex. "E" for Identification. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackey vs. Norma Mining Co.

Certificate of Clerk U. S. District Court to Plaintiff's Exhibits "B" and "E."

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing eight and a fraction typewritten pages are a full, true and complete copy of Plaintiff's Exhibits "B" and "E" filed in this office

in the case of Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant, originally No. E.–6 (Prescott), No. E.–33 (Phoenix), and now on appeal to the Circuit Court of Appeals for the Ninth Circuit, as the same appear from the original exhibits now on file and remaining in my office.

WITNESS my hand and the seal of said court affixed at my office in Phoenix, Arizona, this 4th day of April, A. D. 1919.

[Seal] MOSE DRACHMAN,
Clerk.
By Nat. T. McKee,
Deputy Clerk.

[Endorsed]: In the United States District Court for the District of Arizona. Certified Copies of Exhibits "B" and "E" in the Case of Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. No. E.–33—(Phoenix).

No. 3319. United States Circuit Court of Appeals for the Ninth Circuit. Norma Mining Company vs. Hugh Mackay. Certified Copy of Plaintiff's Exhibits "B" and "E." Filed Apr. 7, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE NORMA MINING COMPANY,

Appellant,

vs.

HUGH MACKAY,

Appellee.

Order Extending Time to and Including April 5, 1919, to Prepare Record on Appeal.

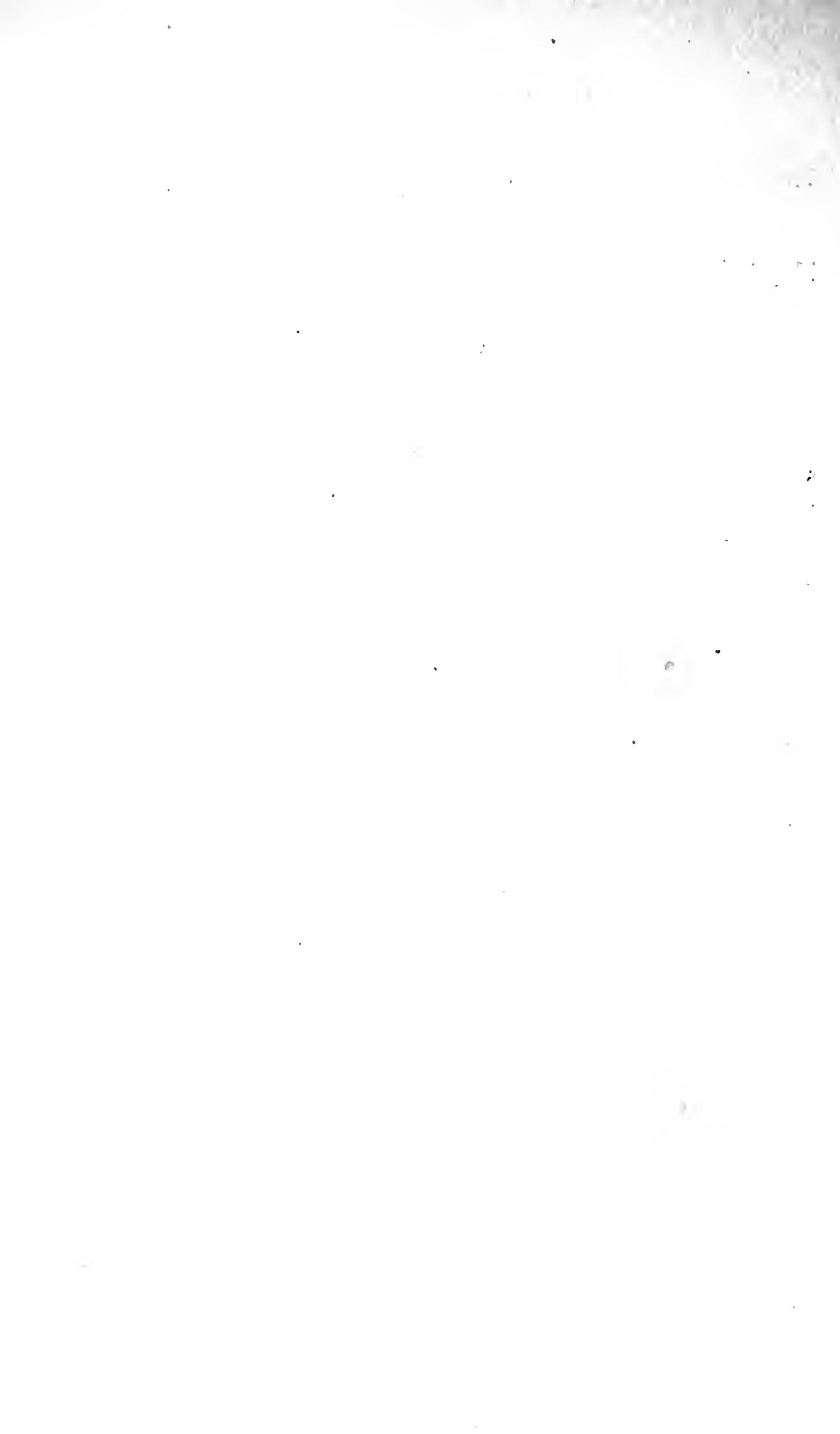
Upon the request of the Clerk of the United States District Court, for the District of Arizona, and good cause therefor appearing,—

IT IS HEREBY ORDERED that the time of the appellant to file the transcript of record and docket the above-entitled cause in this court be, and the same is hereby, extended to and including April 5th ~~25th,~~ 1919; and that the time to file the bond heretofore approved be, and the same is hereby, extended to and including April 5th ~~10th,~~ 1919.

Dated March 25, 1919.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee. Extension of Time to Prepare Record on Appeal. Filed Mar. 25, 1919. F. D. Monckton, Clerk. Re-filed Mar. 28, 1919. F. D. Monckton, Clerk.



No. 3319

5

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY (a corporation), *Appellant*, vs. HUGH MACKAY, *Appellee*.	

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

LLOYD MACOMBER,
Humboldt Bank Building, San Francisco,
MAURICE T. DOOLING, JR.
City Hall, San Francisco,
Attorneys for Appellant and Petitioner.

FILED
F. D. MONCKTON,
CLERK.

No. 3319

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY (a corporation), *Appellant,* vs. HUGH MACKAY, *Appellee.*	

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully asks that the decision of this Honorable Court, made in this cause, on the 7th day of July, 1919, be set aside and a rehearing granted.

In support of its petition appellant desires to urge the following points:

1. We believe that the Court has been led into error in holding that the notice of sale "between legal hours" was sufficiently definite as to time.

2. We believe that the record clearly shows that this Court has inadvertently fallen into error in holding that the description of the property in the notice of sale is exactly as given in the mortgages.

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1. THE NOTICE WAS INSUFFICIENT IN STATING THAT THE SALE WOULD TAKE PLACE "BETWEEN THE LEGAL HOURS OF SALE".

This sale was held under the provisions of the Act of Congress adopted March 3, 1893, Chapter 225, 27 Stat. L. 751, entitled "An act to regulate the manner in which property shall be sold under orders and decrees of any United States Courts."

At the outset we desire to urge upon the Court a consideration which, through inadvertence, was not mentioned in the briefs. We were so confident of the correctness of our position that a specific hour must be designated in the notice of sale that we assumed that the Statute of Arizona fixing the legal hours of sale for real property was applicable to this sale. But we are satisfied upon reflection that this is not the case.

An examination of the Act of Congress governing this sale will show that it *does not fix any hours* during which a sale of real property or any sale must or shall be held. For anything that appears in the Act to the contrary such a sale may be held at any reasonable hour, and the Statute of Arizona clearly cannot limit the power of the Federal Courts in this regard. There being no legal hours of sale

provided in the Act of Congress under which the sale was held, it would seem to follow necessarily that the statement in the notice that the sale would be held "between the legal hours of sale" is meaningless. The notice is no more than a notice that the sale would be held on a certain day, and the reference to "legal hours" when none are provided in the Act governing the sale is worse than useless.

But even if the notice in designating "legal hours of sale" be construed as designating the hours of 10 A. M. to 4 P. M. fixed by the Arizona Statute, we think the Court has been led into error in deciding that such a notice is sufficient.

The Court in its opinion quotes from, and apparently relies upon the reasoning of, the opinion in the case of *Burr v. Borden,* 61 Ill. 389. This case was not cited in Appellee's brief and we had no opportunity prior to the decision of this Court to comment upon or discuss it.

In the first place the case of *Burr v. Borden,* was a collateral attack upon the sale and it needs no citation of authorities to establish the well settled rule that Courts are extremely reluctant to set aside a judicial sale in a collateral proceeding. To do so they must hold the sale not only voidable but void. As the Court said in this very case of *Burr v. Borden,* at p. 396:

> "In the case before us, whatever doubts the evidence tends to raise must be resolved against the complainants, when we consider the position of Blake as an innocent purchaser on the one hand, and the long acquiescence on the

> other, of all parties affected by the sale sought to be set aside."

The Court in the *Burr* case said, referring to the notice of sale there in question:

> "Persons who see the advertisement and desire to attend the sale, can easily ascertain the hour by inquiring of the parties about to make the sale."

Let us apply this reasoning to our own case. The Federal District Court sits in Phoenix, Arizona. The sale was held at Kingman, Mohave County, Arizona, almost a full day's journey from Phoenix by train. It was held by a special master who resided at Phoenix, and only went to Kingman to hold the sale. The notice of sale was inserted in a newspaper published in the town of Kingman. How can it be said that persons in Kingman or Mohave County who might see the advertisement and desire to attend the sale could easily, or at all without great difficulty, ascertain the hour by inquiry of the special master who resided at Phoenix, a day's journey away. As a matter of fact, although this does not appear from the record, at the time of the first attempted sale, which was afterward set aside by the Court, appellant sent a telegram to the sheriff of Mohave County to be delivered to the special master, and although the sheriff watched the courthonse door in Kingman, where the sale was noticed to be held, all during the day fixed for the sale he did not see the master and was unable to deliver the telegram. We think that it is obvious

that it is not true that persons who saw this advertisement and desired to attend the sale could easily ascertain the hour by inquiring of the parties about to make the sale.

The Court in the *Burr* case, continued:

> "If unwilling to wait at the appointed place, and if deceived by them and prevented from making a desired bid, the sale might be set aside."

We submit that it is unfair to place the burden upon the defendant to discover and show that parties were unwilling to wait at the appointed place or were deceived and prevented from making a bid. It would be very difficult, and in most cases absolutely impossible, for the defendant to discover or ascertain whether or not members of the public had been prevented from bidding by the character of the notice. It might be that a great many people would be deterred from attending the sale, and yet they would in ninety-nine cases out of one hundred never take the trouble to advise the defendant of that fact, even if they knew where the defendant could be reached. The notice should be of such a character that there would be no danger of prospective bidders being discouraged or prevented from bidding at the sale.

The arguments advanced by the Court in the *Burr* case based upon the convenience of noticing a sale to be held between certain hours are, we submit, more than counter-balanced by the manifest incon-

venience to the bidding public and consequent unfairness to the defendant from such notice.

It should be further noticed that this case of *Burr v. Borden* is directly overruled by the later Illinois case of *Bondurant v. Bondurant,* 96 N. E. 306, where the Court expressly held that the notice of sale must specify the exact hour. This Court was mistaken in saying that in the *Bondurant* case "the Court refers to the statute as one which prohibits the sale unless the time of day is specified in the notice." What the Court did say in the *Bondurant* case was that the act with regard to executions provides that the time of day be specified "and manifestly similar rules should apply to judicial sales in general" (96 N. E. 308).

This Court in its opinion adverts to the Statutes of Arizona, paragraph 2570 (R. S.) with regard to the sale of real property and says:

> "The Arizona statute quoted in the statement does not contain a requirement that the notice shall specify the time and place of sale, although the general provision is that sale shall be between the hours of ten o'clock A. M. and four o'clock P. M."

But the Court only quoted the third subdivision of paragraph 2570 (R. S.). The whole paragraph reads as follows:

> "Notice of sale under execution shall be made as follows:
> (1) In the case of perishable property, by posting written notice of *the time and place of sale* in three public places, two of which shall be

in the precinct and one at the door of the court house of the county in which the sale is to take place, for such a period of time before the sale as may be reasonable, considering the character and condition of the property.

(2) In case of other personal property, by posting a similar notice in three public places in the county, one of which shall be at the court house door and two in the precinct where the sale is to take place, for not less than ten days successively before the day of sale.

(3) In case of real property, by posting notices in three public places in the county, one of which shall be at the court house door, and publishing a copy thereof in some newspaper printed within the county, if there be one, for three weeks before the day of sale. Such notices shall notice the judgment, parties, amount and court in which it was rendered, and particularly describe the property to be sold. Real property shall be sold at the court house door of the county wherein situated between the hours of ten o'clock A. M. and four o'clock P. M. Personal property shall be sold on the premises where it is taken in execution, or at the court house door of the county, or at some other place, if, owing to the nature of the property, it is more convenient to exhibit it to purchasers at such place."

We think it evident that the notice for the sale of real property equally with the notice for the sale of perishable property and other personal property provided for in this paragraph 2570 (R. S.) must specify the time and place of sale.

In addition to this the Court absolutely failed to consider the provision of Section 1369 of the Ariz-

ona Civil Code of 1913 providing for the postponement of sales as follows:

> "The sheriff or other officer may postpone the sale from time to time. In case of such postponement the posting and publication of notice, if it be published, must be continued until the day to which the sale is postponed, and there shall be appended at the foot of the published and posted notice a memorandum in substantially the following form:
>
> " 'The above sale is postponed until the................. day of.............................., 19..........., at................. o'clock.........M.
>
> Sheriff (or other official title as the case may be).' "

As we said in our closing brief herein, it is well settled that all parts of a statute must be construed together to make a harmonious whole. The provision for a notice of postponement to ".................. o'clock ......M." indicates that a particular hour must be named. But certainly no more particularity in this regard will be required of the notice of postponement than of the original notice.

This sale was conducted under the Act of Congress above referred to, and the provisions of the Arizona law are important only as showing the practice in that State. Nevertheless as said in *Bondurant v. Bondurant,* quoted *supra* "manifestly similar rules should apply to judicial sales in general."

The Court also failed to notice that in the decree in this case it is expressly provided that the Master shall give "public notice of the *time* and place of said sale" (Trans. p. 23).

We feel that in announcing the rule which it has on this point this Court has set its face squarely against the modern trend of authority. The case of *Burr v. Borden* was decided in 1871. The case of *Evans v. Robberson* also relied upon by the Court was decided in 1887. On the other hand of the cases cited by appellant on this point *Bondurant v. Bondurant* was decided in 1911, *Hayes v. Pace,* 78 S. E. 290, was decided in 1913, and *Jensen v. Andrews,* 163 N. W. 571, was decided in 1917. If this case had arisen prior to 1911, *Fitzpatrick v. Fitzpatrick,* 6 R. I. 64, would have been the sole authority in support of the position, that the notice of sale must fix a particular hour. We submit that the fact that all of the recent cases have held directly contrary to what was up to ten years ago the practically accepted rule is not due to mere accident. It is more than a coincidence. It is based upon the fact that the older cases were wrong in principle, and that the modern courts realize this fact and have determined to fix a juster and more reasonable rule.

Commenting on the older cases Freeman in his work on *Executions,* 3d Ed., Vol. II, Sec. 285c, p. 1646, says:

> "It would seem that the notice ought to *name the very hour* at which the sale will commence, so that persons having any inclination to attend will not be deterred from doing so by the fact that they might be kept waiting during all the business hours of the day."

Since the learned author wrote this at least three Courts in the cases which we have cited have reached

the same conclusion. Is this Court going to turn its back upon those decisions and revert to the line of authorities which Mr. Freeman criticized? This is the first time that a Federal Court has been called upon to say what sort of a notice is required by the Act of Congress of March 3, 1893. We feel very strongly that this Court in deciding this question should reconsider its decision in this case, and should align itself with what we must consider the correct and more liberal doctrine, that a notice of sale should specify the precise hour at which the sale is to be held.

We urge this the more earnestly because the Court is laying down not only the rule to be applied in the instant case, but a rule of practice which will govern all judicial sales hereafter to be held in this Circuit. In doing this it should satisfy itself that it is not establishing a rule which will work injustice or oppression, but one which will tend to promote fairness and secure the highest possible figure in all judicial sales.

---

2. THE DESCRIPTION OF THE PROPERTY IN THE NOTICE OF SALE IS NOT "EXACTLY AS GIVEN IN THE MORTGAGES".

This Court said in its opinion in this case:

> "The description included within the notice is exactly as given in the mortgage under which the sale was made and was sufficient."

In so holding this Court has inadvertently fallen into error.

The description of the property in the notice of sale clearly described too much, as pointed out in our closing brief.

The two mortgages, Exhibits "B" and "E", Transcript pp. 68 and 72, reserved to the mortgagor the right to work the mines and remove the ore therefrom in the usual manner until the property shall have been sold and *conveyed* under forclosure proceedings.

On page 69 of the transcript we read:

> "In executing this instrument the Mortgagor reserves the right to mine ore and to operate this property in the usual and customary way of mining and operating such property, taking and using any and all proceeds, incomes and profits from said property as fully and to the same extent as if this indenture had not been made, until the property may be sold and conveyed under this mortgage by reason of the default of the payment provided herein, in event that such default should occur."

The other mortgage likewise provides (Trans. p. 74).

> "Until default shall be made in payments of principal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed and every part and parcel thereof, with the full right and privilege of

> developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made."

It is obvious that the description of the property in the notice of sale should have mentioned this reservation. The rights reserved in the mortgages were valuable property rights. *Pro tanto* until these rights were extinquished by the execution of a deed at the end of the period of redemption appellant continued to be the owner to that extent. To fail to mention this reservation in the description was in effect to include in the description and consequently in the sale these valuable rights which the mortgage itself reserved to appellant. It was no different than if, in selling the fee belonging to a remainderman, a life estate belonging to another person should be included in the description, and sold.

It is clear that property belonging to appellant which was not covered by appellee's mortgages, but expressly excluded therefrom, has nevertheless been advertised and sold to appellant's injury.

We respectfully submit, therefore, that this Court should grant a rehearing in this cause and give further consideration to the points suggested, to wit:

(a) That the Act of Congress of March 3, 1893, under which the sale was made provides no hours of sale and, therefore, that the notice that the sale

would be held "between legal hours of sale" was meaningless;

(b) That in any event the notice should specify a particular hour of sale;

(c) That the description of the property was incorrect and prejudicial because it did not refer to or exclude the reservations expressly made in favor of appellant in the mortgages.

Dated, San Francisco,
August 4, 1919.

Respectfully submitted,
LLOYD MACOMBER,
MAURICE T. DOOLING, JR.
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
August 4, 1919.

MAURICE T. DOOLING, JR.
Of Counsel for Appellant and Petitioner.

No. 3319

IN THE

United States Circuit Court of Appeals

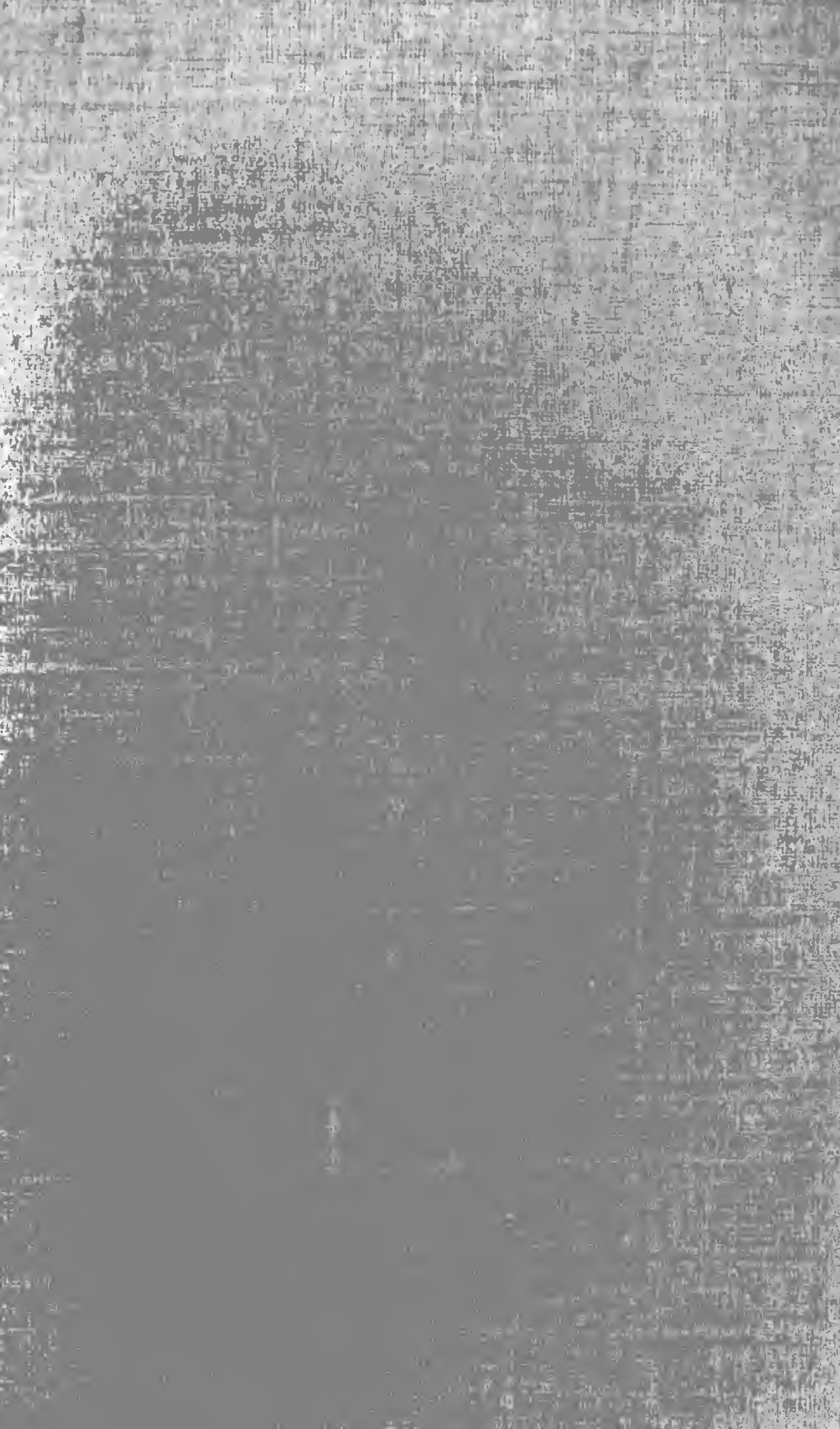
For the Ninth Circuit

THE NORMA MINING COMPANY (a corporation), *Appellant,* vs. HUGH MACKAY, *Appellee.*	

REPLY BRIEF FOR APPELLANT.

LLOYD MACOMBER,
MAURICE T. DOOLING, JR.,
Attorneys for Appellant.

FILED



No. 3319

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY (a corporation), *Appellant*, vs. HUGH MACKAY, *Appellee*.	

REPLY BRIEF FOR APPELLANT.

This is an appeal from an order of the Arizona District Court confirming the sale of certain mining property owned by appellant.

The property was sold to the mortgagee, appellee herein, for the amount of the judgment and costs.

The price paid for it—$27,574.28—is admittedly only one-quarter of its market value.

If the sale is confirmed appellant will lose its valuable property at a sacrifice of at least seventy-five thousands of dollars. If the sale is set aside appellee can lose nothing.

We submit that upon such a showing this Court should reverse and set aside the order of confirmation if any irregularity appears in the proceedings.

That there was irregularity, and irregularity of a grave and damaging character, in the conduct of the sale plainly appears from the record. This irregularity is such that, coupled with the gross inadequacy of price, it must, in our opinion, result in the reversal of the order of confirmation.

WHERE THE PRICE BID FOR THE PROPERTY IS INADEQUATE THE COURT WILL SET ASIDE THE SALE FOR EVEN SLIGHT IRREGULARITY OR UNFAIRNESS.

The undisputed evidence shows that the property here in question is worth in excess of one hundred thousand dollars (Affidavit of A. Lafave, Trans. p. 51). It was sold to appellee for the amount of the judgment and costs—$27,574.28. So that admittedly the property was sold for only one-quarter of its actual value.

In this connection it is important to note that the value of silver has more than doubled since the sale of these properties. The value of the mines has, of course, also proportionately increased. So that a sale at this time could be made to much greater advantage.

Inadequacy of price so gross as to shock the conscience has been held in itself to be a sufficient reason for setting aside a judicial sale. This is the rule in Arizona.

McCoy v. Brooks, 9 Ariz. 157, 80 Pac. 365.

But even though the inadequacy of price is not so gross as to justify the setting aside of the sale on that account alone, it is well settled that where such inadequacy of price exists very slight additional circumstances of unfairness or irregularity will be held sufficient to necessitate the setting aside of the sale.

The rule in this regard is thus stated in Cyc.:

> "When in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, or any apparent unfairness or impropriety, the sale may be set aside, although such additional circumstances are slight and, if unaccompanied by inadequacy of price, would not furnish sufficient ground for vacating the sale."

24 Cyc. 39-40.

The decisions are uniformly to this effect:

> "If there are irregularities, although slight, coupled with an insufficient price, the sale will be set aside."

Bondurant v. Bondurant, 96 N. E. 306, 308 (Ill.)

> "Inadequacy of price, taken alone, is seldom if ever sufficient to authorize the setting aside of a sheriff's sale; yet great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such case, slight additional circumstances only are required to authorize the setting aside of the sale."

Means v. Roseyear, 42 Kan. 377, 383; 22 Pac. 319.

> "Where the price bid is greatly disproportioned to the actual value of the property, only slight additional circumstances are required to justify and make it the duty of the chancellor to set it aside."
>
> Bean v. Hoffendorfer, 2 S. W. 556, 558 (Ky.).

This rule is well recognized by the Supreme Court of the United States.

> "While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience."
>
> Schroeder v. Young, 161 U. S. 334, 40 L. Ed. 721.

See also:

Graffam v. Burgess, 117 U. S. 180, 29 L. Ed. 839;

Ballentyne v. Smith, 205 U. S. 285; 51 L. Ed. 803.

The undisputed facts bring this case clearly within the rule above enunciated. The price paid for the property is grossly inadequate, and under the rule announced by the Supreme Court of Arizona in McCoy v. Brooks, *supra,* the order of confirmation should be set aside on that ground alone.

But even if the Court should consider that the inadequacy of the price taken alone is not sufficient to justify the setting aside of the sale, that inade-

quacy is an element to be seriously considered in connection with any irregularity or unfairness in the conduct of the sale. And in view of the great inadequacy of price any additional element of unfairness or irregularity, however slight, should be held sufficient to turn the scale in favor of appellant.

With this principle in mind we shall proceed to a consideration of circumstances which in our judgment constituted, not slight, but grave irregularity.

THE FAILURE TO DESIGNATE A PARTICULAR HOUR OF SALE IN THE NOTICE INVALIDATED THE SALE.

The decree provides that the Master give "public notice of the *time* and place of said sale" (Trans. p. 23).

The notice of sale provided for the time of sale as follows (Trans. p. 38):

"Between *the legal hours of sale* on Wednesday, the 12th day of June, 1918".

The legal hours of sale for real estate in Arizona are fixed by statute from 10 A. M. to 4 P. M., so that the notice fixed a period of six hours during which the sale might be held.

The purpose of advertising a sale of this character is to attract as many bidders as possible to the sale in order that the property may bring as high a figure as can be obtained. It is obvious on the face of it that a notice of this character, specifying a period of six hours during which the sale might be

held, far from encouraging prospective bidders to attend, would actually discourage them from attending. No one, unless his interest in the particular property was very great, would put himself to the inconvenience of attending at 10 o'clock A. M. with the possibility of having to wait in uncertainty until 4 o'clock P. M. As well might a person invite a friend to meet him for lunch between 10 o'clock and 4 o'clock and expect the friend to accept his invitation with alacrity and gratitude. As well might a theatre advertise that its curtain would rise sometime between 6 and 10 P. M. and the manager expect the public to storm the box office for tickets. Human nature is not so constructed. We demand, and demand rightly, that others shall show a reasonable respect for the value of our time. It is not many men who would feel that they could afford to wait six hours in the Arizona sun for an opportunity to bid upon any property, however valuable. We feel justified in asserting that ninety-nine out of every one hundred reading such a notice as this would refuse to inconvenience themselves to the extent of attending the sale with the possibility of having to waste five or six hours awaiting the convenience of the Master. The man who would place so little value upon his time would in the great percentage of cases be of that class who have more time than money. Common sense would dictate to an individual who was compelled to sell his own property at public auction to fix a definite hour for the benefit of the bidding public. Common jus-

tice should dictate to the Master who is selling another's property to do as much. Unless the public sale is made reasonably attractive to the bidding public why go through the hollow form of holding the sale in public? The mortgagee could purchase just as well in private behind closed doors.

It seems so obvious to us that a notice of sale fixing a period of several hours during which the sale may be held is unreasonable, that we were surprised to find any authority to the contrary. However. there are a few cases, none of them decided within the last thirty or forty years, holding such a notice sufficient.

We have looked in vain for any authority on this question in the Federal Courts or in the State of Arizona; so that the question in this Court is one of first impression. We respectfully urge that in deciding this point this Court should take what in our opinion is the only fair, just and common sense view of the matter; that it should establish a rule which will render impossible any chance of collusion between the Master and the judgment creditor to prevent public competition, and which will insure to the owner of the property the advantages of free and full public bidding which the law intends that he should have; that it will place itself in line with the modern trend of judicial authority, and establish the rule in this jurisdiction that in advertising judicial sales a definite and certain hour must be fixed for the sale to take place.

In support of this rule we direct the Court's attention to the following authorities:

Fitzpatrick v. Fitzpatrick, 6 R. I. 64;
Bondurant v. Bondurant, 96 N. E. 306 (Ill.);
Jensen v. Andrews, 163 N. W. 571 (S. D.);
Hayes v. Pace, 78 S. E. 290; 162 N. C. 288.

In Fitzpatrick v. Fitzpatrick, *supra,* the Supreme Court of Rhode Island said:

> "The notice of sale under Donnelly's mortgage * * * is, upon inspection, found defective in the undispensable requisites of naming the time, to wit, *the hour of the day,* and the place of sale. Such a defect defeats the whole purpose of the notice, which, as we view it, is *to bring together such a body of purchasers* as by fair competition will insure, as far as this goes, a full price for the subject of sale." (Italics ours.)

In Bondurant v. Bondurant, *supra,* the Illinois Supreme Court said (96 N. E. 308):

> "If there is illegality or irregularity sufficient to avoid a sale, the court will refuse approval, and if there are irregularities, although slight, coupled with an insufficient price, the sale will be set aside (Citing cases).
>
> In this case there was not only inadequacy of price, but *a most serious irregularity,* to say the least, *in failing to state any hour for the sale."* (Italics ours.)

In Hayes v. Pace, *supra,* the North Carolina Court was considering an appeal from an order refusing to dissolve a temporary injunction forbidding the making of a deed to a purchaser at a

judicial sale. On the point here in question the Court said (162 N. C. 293-4):

> "The affidavits not only show abundant evidence of collusion * * * but it appears further that the advertisement of sale mentioned no hour when the sale was to take place.
>
> In 27 Cyc. 469, the rule with respect to the time and place of sale is stated as follows: 'The notice must specify the place at which the sale will be held with a degree of certainty that intending bidders will not be misled, but will be able to find it, and it must also give *the time of the sale with equal certainty,* stating not only the day, *but also the hour* at which it will be held'. Fitzpatrick v. Fitzpatrick, 75 Am. Dec. 681.
>
> The omission of such an essential requisite to make a valid sale is strong evidence of a fraudulent purpose to deceive and mislead probable bidders. This fact alone is sufficient to justify the judge in continuing the injunction, and *if it be shown at the final hearing that no time of sale was given in the advertisements, the sale should be set aside.*" (Italics ours.)

In Jensen v. Andrews, *supra,* the Court discussed the question here involved at great length. We quote as follows from that decision (163 N. W. 571-2):

> "It is the contention of respondent that said notice of sale was fatally defective by reason of its failure to specify the hour of day at which said sale would take place, and that by reason thereof the said sale and all the foreclosure proceedings, including the sheriff's deed to appellant, were void. We are of the opinion that respondent is right in this contention. Section 640, Code of Civil Procedure, prescribes the form and contents of notice of foreclosure

sale by advertisement, and among other things provides that the notice of sale must specify the time and place of sale. Section 641 of the same code provides that the sale must be made at public auction between the hours of 9 o'clock in the forenoon and the setting of the sun on that day. It is the contention of appellant that a notice of sale, specifying the day only, is sufficiently specific as to time when taken in connection with the provisions of section 641. We are of the view, however, that this contention is untenable. We are of the view that sections 640 and 641 must be construed together; that under section 640 *the specific hour of the day must be stated*, at which the sale will be made; and that under section 641 that specific hour must be within the time included and mentioned in section 641. * * * It seems to be generally held, under statutes containing the provision that the notice must specify the 'time and place of sale', that the notice must specify the place with such degree of certainty that intending bidders will not be misled, and it must also give the time of the sale with equal certainty, stating not only the day *but also the hour* at which it will be held. * * *

The object and purpose of specifying the time in a notice of public sale is *to advise and secure the presence of persons who might desire to bid upon and purchase the property to be sold.* The naming of *the specific hour* in a notice of public sale would have a tendency to secure a *greater number of purchasers and bidders* at such sale than a notice merely naming the day, as it might be a *great inconvenience to some intended or prospective bidders and purchasers to remain at the place of sale many hours of the day in uncertainty as to the time when such sale would take place.* We are of the view that section 640 of our Code requires the specific hour of the day to be named."

These cases seem to us to be conclusive on this question.

If we look to the Arizona statute we likewise find that the Legislature of the State of Arizona evidently contemplated the fixing of a precise hour in such a notice of sale.

Section 1367 of the Arizona Civil Code of 1913 provides for notices of sale, giving "time and place".

Section 1369 provides for postponements of sale as follows:

> "The sheriff or other officer may postpone the the sale from time to time. In case of such postponement the posting and publication of notice, if it be published, must be continued until the day to which the sale is postponed, and there shall be appended at the foot of the published and posted notice a memorandum in substantially the following form:
>
> "'The above sale is postponed until the........... day of..................., 19......, at .... o'clock ....M. Sheriff (or other official title as the case may be).'"

It is well settled that all parts of a statute must be construed together to make a harmonious whole. The provision for a notice of postponement to "............ o'clock ......M." indicates that a particular hour must be named. But certainly no more particularity in this regard will be required of the notice of postponement than of the original notice.

The case of Evans v. Robberson, 92 Mo. 192, cited in appellee's brief, was a case of a collateral attack

upon a sale. In such a case, of course, the presumptions are all in favor of the validity of the sale.

In the later case of Holdsworth v. Shannon, 21 S. W. 85, the Missouri Court set aside a sale held at 10:30 A. M. on the ground that the hour was unusual and that such sales by custom were usually made between 1 and 2 P. M. This is obviously a recognition by the Missouri Court of the unreasonableness of its earlier decision.

In summing up this point we respectfully submit that the precise hour of sale should be given in the notice; that the failure to give the precise hour defeats the very purpose of the notice which is to secure the attendance of as many bidders as possible; and that to hold otherwise will be to open the door to possible collusion and unfairness at the property owner's expense at the worst, and at the best to deprive him of the opportunity of securing a fair price for his property which a full attendance of bidders would tend to insure.

In this case the property did not bring a fair price. Can this Court conscientiously hold that a notice of the character here in question was calculated to secure a fair price for the property?

THE NOTICE OF SALE WAS DEFECTIVE IN IMPROPERLY DESCRIBING THE PROPERTY.

The property sold consisted of a great number of mines and there is upon these mines a great deal of personal property such as machinery, hoists, engines,

mills, etc. The notice of sale simply mentions these in a general way, without describing them with any particularity or definiteness (Trans. p. 39).

In

> Robertson Mfg. Co. v. Chambers, 77 Atl. 287 (Md.),

it was held that a notice which failed to describe an office and stable as part of the property was fatally defective. Certainly the failure to particularly describe valuable mining accessories is equally objectionable.

But there was a further and more serious mistake in the description.

The two mortgages, Exhibits "B" and "E", Transcript pp. 68 and 72, reserved to the mortgagor the right to work the mines and remove the ore therefrom in the usual manner until the property shall have been sold and *conveyed* under foreclosure proceedings.

On page 69 of the transcript we read:

> "In executing this instrument the Mortgagor reserves the right to mine ore and to operate this property in the usual and customary way of mining and operating such property, taking and using any and all proceeds, incomes and profits from said property as fully and to the same extent as if this indenture had not been made, until the property may be sold and conveyed under this mortgage by reason of the default of the payment provided herein, in event that such default should occur."

The other mortgage likewise provides (Trans. p. 74).

> "Until default shall be made in payments of principal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed and every part and parcel thereof, with the full right and privilege of developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made."

The notice of sale contained no mention of this reservation to the mortgagor of the right to mine the property until it was actually *conveyed;* and the Master purported to sell the property without any such reservation. No conveyance could be executed until the time for redemption had run—six months after the sale by Arizona statute. It follows that appellant was deprived of a most valuable right secured to him by his mortgage. He might conceivably have taken out enough ore during the redemption period to have enabled him to redeem the property. In any event he was deprived of a valuable property right in direct violation of the terms of his mortgages. We submit that in advertising and

selling appellant's property so as to deprive him of this right to work the mines pending the final execution of a conveyance the Master acted in such direct contravention of the express provisions of the mortgages that the sale must be set aside.

THE SALE WAS MADE AT A TIME WHEN A PROPER PRICE COULD NOT BE SECURED.

The sale was made at a time when the Federal Government was actually prohibiting the formation of corporations, the sale of stocks, and the construction of buildings, roads, etc. It was likewise discouraging all private investments and encouraging investments in government bonds and activities directly tending to win the European War. It is obvious that the property could not bring a reasonable value at public sale at such a time.

A sale for an inadequate price will be set aside if made at a time of financial depression.

> Johnson v. Avery, 57 N. W. 217;
> Johnson v. Avery, 62 N. W. 283.

Or during a pestilence which discourages public bidding and depresses prices.

> Littell v. Kuntz, 2 Ala. 256;
> Kirkland v. Texas, etc. R. Co., 57 Miss. 316.

It should equally be held that a sale of this character for a grossly inadequate price, made at a time when, owing to a great war, the government is discouraging private investments and construction work of every character, should be set aside.

In conclusion we respectfully submit that the order of confirmation must be set aside for the following reasons:

1. That the price for which the property was sold is grossly inadequate;

2. That the notice of sale was fatally defective in not fixing a specific hour for the sale;

3. That the notice of sale did not sufficiently or accurately describe the property, and in particular that it described and the Master sold valuable property rights reserved by the mortgages to appellant;

4. That the sale was made at a time when it was impossible to realize the value of the property by reason of Government regulations in connection with the war;

5. That these various irregularities must be given additional weight by the Court because of the inadequacy of price;

6. That the property was sold to the mortgagee for the amount of the judgment and costs and therefore he cannot be injured by a resale, whereas if this sale is to stand appellant is deprived of valuable properties at a loss of at least $75,000.00.

It is respectfully submitted, therefore, that the order confirming the sale should be reversed and vacated.

Dated, San Francisco,
June 18, 1919.

LLOYD MACOMBER,
MAURICE T. DOOLING, JR.,
Attorneys for Appellant.

No. 3319

UNITED STATES
Circuit Court of Appeals
For the Ninth Circuit

THE NORMA MINING COMPANY, A CORPORATION,
Appellant,

vs.

HUGH MACKAY,
Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

ROBINSON & ROBINSON,
Attorneys for Appellee.

W. F. ROBINSON PTG. CO., DENVER

UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY, A CORPORATION, *Appellant.* vs. HUGH MACKAY, *Appellee.*	No. 3319

BRIEF AND ARGUMENT OF APPELLEE.

This cause comes before this Court on appeal from an order of the United States District Court for the District of Arizona confirming a sale under a Decree of Foreclosure of two mortgages. The cause had previously been before this Court on appeal by the same appellant, and is Cause No. 2876. The appellant, feeling aggrieved by the Order confirming the sale, has prayed an appeal to this Court and assigned certain errors, which we will briefly discuss and endeavor to show that the Court com-

mitted no error against the appellant in entering said Order.

In regard to the first Assignment of Error, that sufficient notice of the time and place of sale was not given, it appears that the Notice of Re-Sale recites (Abstract of Record, page 38), that the property would be offered for sale "between the legal hours of sale on Wednesday, the 12th day of June, 1918, at the Court House door of Mohave County, in the Town of Kingman, Mohave County, Arizona." The place, therefore, seems to be well defined, the day likewise. The hour in the day is not specifically set except as being between the legal hours of sale on said day. In Arizona there is a statute providing that sales of real property on execution shall be made between the hours of 10 o'clock a. m. and 5 o'clock p. m.

> "Where the statute fixed the hours of the day between which legal sales were to be held a Notice of an Execution Sale which advertised the sale to occur between the "lawful hours" of the day mentioned was held sufficient."
>
> 24 Cyc., 20.
>
> "It is contended for the appellant that the recital in said deed that the real estate was advertised to be sold between the "lawful hours" of the day upon which it was to be sold renders it invalid. There is nothing in this contention. It was the duty of the sheriff to designate the day upon which the land would be sold in his advertisement. The law fixed the hours of that day between which it must be sold; and while it was not necessary that the hour should be stated in the advertisement, it was the duty of the sheriff to sell between those hours."
>
> Evans vs. Robberson, 92 Mo., 192.

There is no showing at all that any person or prospective bidder was deceived by this method of designating the time of sale.

The second Assignment of Error is upon the ground that the Notice of Re-Sale did not describe the property to be sold with sufficient certainty. A reference to the Notice and a comparison of it with the mortgages being foreclosed best answers this Assignment. The description in the Notice is exactly the same as given in the second mortgage. Compare Abstract of Record, pages 38, 39, with Abstract of Record, pages 73, 74. It will, therefore, be seen that the same certainty was expressed in the Notice as had been used by the appellant in making its mortgage.

The Third Assignment of Error goes to the sufficiency of the consideration. It is a well-known rule of law that a judicial sale will not be set aside for inadequacy of price.

> "The rule in reference to judicial sales is that in the absence of fraud and unfairness mere inadequacy of price, however gross, does not invalidate the sale."
>
> Wells vs. Lennox, 159 S. W., 1099, and cases therein cited.

> "The sale will not be set aside for mere inadequacy of price unless it is so gross as to shock the conscience, but it will be if great inadequacy is accompanied by slight circumstances of unfairness in his (the bidder's) conduct."
>
> Laton vs. Rhode Island Hospital Trust Co., Circuit Court of Appeals, 8th Circuit, 205 Fed. Reporter, 277, and cases therein cited.

The property was previously sold on the 18th day of May, 1916, and that sale set aside and an Order entered to re-sell. (Abstract of Record, page 34.) It appears

that the plaintiff was the purchaser at the first sale. The price paid was the amount of the judgment and costs. (Abstract of Record, page 32.) Two years later the property is again sold to the appellee for the then amount of the judgment and costs and interest. The record does not disclose, but the fact is that the property was the subject of two other judicial sales during this period, one for over Six Thousand Dollars ($6,000) taxes, and the other for a subsequent labor lien. In each case the plaintiff therein was the purchaser at the amount of the judgment and costs. It would therefore appear that the price is all that could be obtained.

The appellant sought that the sale of May 18th, 1916, be set aside. (Abstract of Record, page 32.) In that application appellant took the position that conditions had changed so that the property should bring more. No irregularity in the sale was claimed or existed. The Court granted the prayer. In such case the ground set forth in the Fourth Assignment of Error should be considered with small favor:

> "It does not lie in the mouth of one who by strenuous and protracted resistance has delayed a sale for years to claim still further delay on account of the depressed financial condition of the country."

Am. & Eng. Enc., Vol. 17, page 973; Pewabic Min. Co. vs. Mason, 145 U. S., 349.

Notwithstanding the seventh Assignment of Error, the sale was not prematurely made under the order of resale or any rule of this Court or the District Court.

Respectfully submitted,

ROBINSON & ROBINSON,
Attorneys for Appellee.

No. 3319.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NORMA MINING COMPANY, a Corporation,

Appellant,

vs.

HUGH MACKAY,

Appellee.

BRIEF ON BEHALF OF APPELLANT

LLOYD MACOMBER,
Attorney for Appellant.

Filed this .... day of April, 1919.

F. D. MONCKTON, Clerk.

By .... Deputy Clerk.

THE RECORDER COMPANY, 689 STEVENSON ST., S. F.

FILED
APR 26 1919
F. D. MONCKTON

No. 3319.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE NORMA MINING COMPANY, a Corporation,
Appellant,

vs.

HUGH MACKAY,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an appeal from an order confirming a foreclosure sale entered in the above entitled cause by the United States District Court for the District of Arizona on the 9th day of October, 1918.

We respectfully urge that said order confirming sale should be vacated, and the property resold, by reason of irregularities in the sale.

We respectfully urge that the Notice of Sale (see Trans., pages 37, 38 and 39), as given by the Master, was insufficient, by reason of its being uncertain and indefinite, and also because of the fact that it did not accurately or properly describe the property to be sold, and also because it included property which was

owned by defendant and was not covered by the mortgages which are hereinafter referred to, but was excepted from any lien by said mortgages.

The chief reason which we urge, however, for a resale of said property, is that the amount for which said property was sold at said sale is grossly inadequate, and does not exceed ten per cent of the actual value of the property. The property was bought by the mortgagee himself, Mr. Hugh Mackay, who is the appellee in this proceeding, and he can suffer no possible prejudice by a resale of said property.

Assignment of Errors.

Now comes the defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal of the above-entitled cause from the order confirming sale, made by the United States District Court, for the District of Arizona, on the 19th day of October, 1918.

I.

That the United States District Court, for the District of Arizona, erred upon the hearing of the motion to confirm said sale in overruling defendant's motion to set aside said sale, as follows: Under the exceptions to said sale, filed by the defendant, said defendant represented to the Court that the notice of said sale published in the "Mohave County Miner," a weekly newspaper published in the town of Kingman, County of Mohave, State of Arizona, did not give sufficient

notice of the time and place of said sale. In support of said contention, the defendant showed by the affidavit of publication of said notice that the said notice failed to fix any hour during the 12th day of June, 1918, the day said property was advertised to be sold, at which said sale would be made.

2.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale as follows: That in support of said motion to set aside said sale, the defendant showed to said Court that the notice of sale published by the plaintiff, as aforesaid, did not describe the property to be sold with sufficient certainty or definiteness to enable the public to ascertain therefrom the character and value of said property, and that the machinery and equipment thereon was not described in any manner whatever in said notice.

3.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale, as follows: That in support of said motion to set aside said sale, the defendant showed to the said Court that the price bid for said property, to wit, the sum of $27,574.28, was grossly inadequate and that said price did not exceed twenty-five per cent of the actual value of said property, and that the actual value of said property was greatly in excess of One Hundred Thousand Dollars.

4.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale, as follows: That the defendant, in support of said motion, showed to said Court that at the time said sale was made the public was being importuned and urged by the Federal Government to invest all surplus moneys in Government bonds and other war necessities and the Federal Government at said time discouraged the organization and promotion of new enterprises not necessary to the conduct of the war. That as a result of said policy on the part of the Government, and the condition of the money market arising therefrom, it was at said time very difficult to interest anyone in the purchase of said property.

5.

That the United States District Court, for the District of Arizona, erred in overruling defendant's motion to set aside the sale herein.

6.

That the United States District Court, for the District of Arizona, erred in entering its order confirming the sale herein.

7.

That the United States District Court, for the District of Arizona, erred in entering its order confirming a sale herein, because it affirmatively appears from

the record herein that said sale was prematurely made under the order of sale and the rules of this Court.

WHEREFORE, appellant prays that said order confirming sale be reversed and that said District Court for the District of Arizona be ordered to grant a resale of said property as prescribed by law.

Dec. 28, 1918.

GRANT H. SMITH,
Attorney for Defendant.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy.

Stated in concrete the facts of this case are that the plaintiff, Hugh Mackay, held certain mortgages on the property of the defendant, the Norma Mining Company (see Trans., pages 68 to 78, inc.). These mortgages were foreclosed, and a decree entered by the District Court of the United States for the District of Arizona (see Trans., pages 8 to 26), ordering the sale of the property mortgaged. Thereafter the property was sold, and by reason of some irregularity the sale by the District Court was set aside and a resale ordered. (See Trans., pages 33 and 34.) The order of resale was made on the 27th day of April, 1918. On the 12th day of June, 1918 (see Trans., page 35), the sale of which we are here complaining was made.

The reason for our desiring a resale of said property is that, should this sale be allowed to stand, it would work to the great disadvantage and hardship of the

mortgagor, inasmuch as the figure at which the property was sold, to-wit, Twenty-seven Thousand Five Hundred and Seventy-four and 28/100 Dollars ($27,574.28), is but slightly more than twenty-five (25) per cent of the actual value of the property.

We respectfully refer the Court to the affidavit of Mr. A. Lafave, on page 51 of the Transcript, wherein Mr. Lafave states that the property is worth more than $100,000.00.

THE NOTICE OF SALE STATED NO DEFINITE TIME.

The first point we will urge as irregularity in the sale is that the Notice of Sale merely gave the date upon which the sale would be had without stating the hour of the day. The decree (see Trans., page 23) reads:

> "After giving public notice of the *time* and place of said sale."

We respectfully urge that the word *"time"* as it appears in said decree, refers to the hour of the day. The notice (see Trans., page 38) reads:

> *"Between the legal hours of sale* on Wednesday, the 12th day of June, 1918."

Let us assume that the legal hours, as provided by statute, during which the sale may be made, are from nine in the morning until five in the afternoon. Does it not seem to the Court that the notice could very easily, and as a matter of fact should, designate the precise hour at which the sale would be made? The notice as it is is so indefinite that a person desirous of

becoming a bidder at the sale would be deterred from doing so because of the fact that he would have to be at the designated place at nine o'clock in the morning and remain there until perhaps five in the evening at the caprice of the Commissioner of Sale. In the case of an extremely valuable property, some men might be willing to do that, but in cases where the property was of but slight value, it would tend greatly to lessen public interest, and therefore operate to keep away possible bidders, which would in the end result in property being sold at a sacrifice.

We respectfully urge that such a notice as was given in this case is bad for want of certainty, and the better rule would be to require that the time be given with greater definiteness.

The Property Was Not Properly Described.

The next point we will argue is that the property sold was not described with sufficient certainty, and therefore, that it was improperly described.

In the first place, we have here a great deal of personal property in the way of engines and hoisting apparatus, etc., and milling equipment; and the Notice of Sale merely mentions these in general (see Trans., page 39) by saying:

> "Together with the mill and the machinery therein and the different hoisting plants on the property."

We respectfully urge that this description is entirely inadequate and that in justice to the mortgagor the notice should have specified in detail just what the

equipment consisted of. Only by a detailed statement of the amount and character of mechanical equipment could the public be properly advised in reference to the property to be sold. For instance, in the case of valuable mining and milling equipment, if the notice specified the implements with some degree of minuteness the public would be informed just what was to be sold and thereby the number of good bidders brought to the sale by the notice would be greatly increased.

We respectfully submit that the Notice of Sale, as it appears on pages 37, 38 and 39 of the record, contains no sufficient description of the property sold.

In connection with the description of the property we also respectfully urge that the description as it actually was given in the notice was incorrect.

We respectfully call the Court's attention to the two mortgages, Exhibits "B" and "E," on pages 68 and 72, respectively, of the record. It will be noted that these mortgages provide that until the property is actually conveyed under foreclosure proceedings the mortgagor is to have the right to work such mines and remove ore therefrom in the usual manner. From an inspection of these mortgages, as they appear in the record, it is quite clear that this right to work and remove ore will be continuous right up to the time that the commissioner's sale was completed by actual delivery of deed. In other words, that the ore could be removed by the mortgagor in the customary way all during the legal period of redemption.

On page 74 of the Record we read:

Until default shall be made in payments of prin-

cipal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed, and every part and percel thereof, with the full right and privilege of developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property, and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made.

By the law of Arizona property sold upon foreclosure of mortgage can be redeemed at any time within six months after the date of sale. Therefore, the mortgagor had the right to remove ore from said properties for a period of six months after the foreclosure sale.

As the notice was (see Trans., page 39) it reads:

> "Together with all the dips, spurs, and angles and all the metals, ores, gold and silver bearing quartz, rock and earth therein."

On page 38 of the Record the notice reads, "all the right, title and interest which the defendant, the Norma Mining Company, have in and to the following described property."

From this it is clear that the Master sold property which was not covered by the mortgage.

We respectfully urge that said notice should have been qualified by restricting the amount of ore to such ores as might be left after the period of redemption had expired.

The Date of Sale Was Premature.

As we understand the law, in this case, this sale having been made within less than 60 days from the date of the order of sale, was premature. The order of sale was made on the 27th day of April, 1918, and the sale was made on the 12th day of June, 1918, following—just 45 days, including Sundays, intervening between the date of the order of sale and the date of sale.

In conclusion we will state that the Court can take judicial notice of the fact that at the time the sale complained of was made market conditions for such property were extremely bad; that the public at that time was being importuned by the Federal Government to invest all surplus moneys in Government Bonds, and that the Federal Government at that time discouraged the promotion of mining enterprises such as the one here involved, as not necessary to the conduct of the war, and that as a result it was naturally very difficult at that time to interest anyone in the purchase of said property. We firmly believe that if the resale is allowed by the Court a much better price can be realized for the said property, and the mortgagor will thereby be spared from the heavy loss which would otherwise be thrown upon him.

As we have before stated, the mortgagee himself was the purchaser at said sale and for that reason he cannot suffer any prejudice should a resale be granted by this Court.

The ends of justice cannot be defeated by a resale of the property herein involved, but it may indeed greatly lessen the loss of the mortgagor.

Respectfully submitted,

LLOYD MACOMBER,
Attorney for Appellant.

No. 3320

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK ALIOTO, et al.,

Appellants,

vs.

L. A. PEDERSEN,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
APR 1? 1919
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

FRANK ALIOTO, F. G. A. AIELLO, GIACOMO AIELLO, Santa Alia, Tony Aello, G. Aiello, Bruno Aiello, Domenico Aiello, Salvatore Accetta, C. Aiello, S. Aiello, Matteo Asaro, Girolamo Amenta, Frank D. Aiello, Carmelo Amenta, Calofirobuscemi, G. Belleci, Salvatore S. Bruno, Giaccomi, A. Buffi, O. Bagnio, Peter Beleci, S. Bologna, Matteo Bologna, V. Bellici, Paul Aiello, V. Bellici, V. Brocato, Benedetto Brugato, S. Bologna, Joe Bellici, S. Bologna, Paolo Bellici, C. Cardinali, P. Cavallo, A. Cardinale, S. Cardinale, Paola Costa, G. Castanza, D. Caccianouva, S. L. Conti, F. Constanza, G. Carmelo, D. Cassalnuovo, Liugo Casalnuovo, G. Carnullo, G. Campagno, N. Cataldo, G. Catholico, E. Cardinale, I. Canepa, F. Cardinale, A. Costanza, G. Costanza, G. Cecelio, Augustino Cecelio, A. Davi, F. Constanzo, G. Di'Maggio, F. Di'Maggio, G. Dominico, Sal Di'Franko, F. Di'Grande, M. Delcamo, G. Di'Maggio, B. De'Listo, A. R. De'Guisseppe, G. Di'Angelo, L. G. Danela, A. Dominick, Fran Digrande, F. Evola, Gaitano, John Erickson, A. Fede, Matteo Ferrara, G. Flores, P. Flores, Luigo Flores, A. Flores, G. Facciendi, S. Garlino, Nick Gervasi, C. Garde-

cini, G. G. Guisseppe, G. Gombala, Ivar Helset, Ole Hagen, J. Iello, V. Intravia, Ed. Johanessen, Ed. Johanessen, H. Johansen, S. Bruno, V. Lafranesco, G. Corrunzzan, Z. Lombardi, R. Lucido, A. C. Lucido, F. Lombardo, V. La'-Francesco, M. Lucido, B. Labruzzo, E. Lucido, V. Lombardo, E. Lucido, A. Mortensen, Joe Manescalca, Alfredo Martel, V. Muscato, G. Minea, A. Malampo, G. Magniffo, D. Napoli, T. Ningacia, Nels Nelson, F. P. Navaro, Sven Odland, Sven Olsen, S. Patania, S. Piro, Salvatore Partinigo, N. Patrici, Francisco La'-Paolo, S. Lucinto, G. Piazzo, Jos. Pepetone, Frank Peralto, A. Palma, William Penny, A. Johnson, R. Paulsen, Albert Eastling, Ed. Gustafson, Melmer Olson, A. Rundstrom, John Lundval, Christ Hansen, K. P. Moines, John Valgren, Ben Swanson, Arthur Johanesen, B. Lysbro, Ole Hagen, Martin Swanson, A. Renwall, A. C. Russo, A. Russo, Salvatore Russo, Guisseppe Russo, G. Russo, Natale Russo, A. Russo, S. Russo, Paolo Rizzo, Narvo Russo, D. Russo, S. Russo, V. Romeo, S. Rubino, B. Sabella, F. Storelli, R. Storelli, F. Streppa, T. Sebastiano, Augusto D'Santo, V. Smaline, A. Sarmebi, N. Sebastiano, Antonio Sposito, S. Sancimino, A. Satmedi, Jow. Silva, S. Sammatini, F. Sicilia, V. Salvi, Thore Strand, G. L. D. Salvatore, Tony Lazio, Tonder Strand, Peter Metbush, Alf. Sancimino, Christo Svidese, G. Sonato, B. Torenti, B. Tringali, A. Verduci, F. Ventimiglia, S.

Verduci, Ole Wewang, John Quori, Guisseppe Zanti, Sebastiano Tringali, Guiseppe Ternullo, J. Zhndi, Sam. D. Augustin, P. Nazzarini, P. Cashino, C. Buscenni, F. Mellic, G. Stores, John Vinari, Henning Bergstrom, Mike Pricia, S. Gianio, Salvatore Gulino, M. Guzzetta, F. H. Haynes, G. A. Johnson, M. Lafato, Formica Natale, R. Pisciotto, Peter Pedersen, R. Reinertsen, Alex. Secreto, F. Savalli, Gunder Svenson, John Trapani, and Anders E. Andersen,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

Libel. [5*]

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court.

The libel of the libelants above named, against L. A. Pedersen, libelants, being seamen and fishermen of said district, and said Pedersen being a ship owner and operator and salmon canner, also of said district, alleges as follows, in a cause of wages, civil and maritime:

I.

That heretofore and during the month of May, 1918, libelants were each hired by said L. A. Pedersen at the port of San Francisco, in the State of California, to proceed thence to the Kwichak River in Alaska, and there catch salmon to be delivered to him

*Page-number appearing at foot of page of original certified Apostles on Appeal.

on lighters at said place, and he agreed to pay said libelants each three and one-quarter (3¼) cents for each Red or Coho salmon offered for delivery to him on his lighters at said place by said libelants respectively.

II.

That pursuant to said hiring libelants each signed shipping articles before the United States Shipping Commissioner at the Port of said San Francisco, prior to their departure therefrom for said river in Alaska, that the said shipping articles contained among other things the following:

> "Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated."

III.

That defendant had eight lines of canning machinery and employed at no time in excess of seventeen men, to wit, beachmen, and his said machinery was defective in this, that it was constantly getting out of order, and for that reason defendant was unable to take from libelants fish as they caught them and their boats in which they caught salmon were detained in deliveries, and at no time was defendant able to take from libelants or any thereof salmon in excess of 1,220 fish (salmon) per day, when if he had had proper machinery and a sufficient number of beachmen to operate the same he would have been able to have taken at least 1,500 per day for 30 days, and each of the libelants [6] would have earned $292.50 under said contract of hiring for salmon acceptable to defendant, that they each would have

caught, to wit, Red or Coho salmon, during thirty days of the time they fished for said defendant at said place under said contract, if he had had proper machinery and a proper number of men to operate the same while libelants were fishing for him as aforesaid.

IV.

That it is further provided in said shipping articles as follows:

> If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per-cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given. Boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station.

That the limit above mentioned is an obligation under said contract of hiring on the part of defendant to pay for at least 1,200 salmon every twenty-four hours, whether he took the same or not. It was further provided in said contract of hiring as follows:

> "All salmon must be in perfect condition and not discolored on the outside and must be discharged from boats at least once in twenty-four (24) hours."

V.

That while salmon caught by the libelants were undischarged from their fishing boats, they were com-

pelled to stay in such boats and were unable to obtain sleep or attend to each of their personal wants, or necessities, and that among other reasons was the cause of said matters being inserted in said contract of hiring, also to prevent such salmon as were caught by libelants from becoming spoiled by reason of not being discharged and canned in proper time.

VI.

That on the 5th day of July, 1918, libelants each tendered to defendant at his cannery as aforesaid, in their respective fishing boats, each of such boats having its nets cleared, said tenders being made at defendant's receiving station on said river in [7] Alaska, each 1,200 Red or Coho salmon, in perfect condition, not discolored on the outside or at all, but defendant by reason of his lack of beachmen as aforesaid, and his said imperfect canning machinery, was unable to and did not take the same from said boats for the period of twenty-four hours thereafter, to wit, said boats were not discharged at all on said July 5th, but on July 6th, 1918, that by reason of the premises each of the libelants were entitled to be credited by the defendant with 5,700 Red or Coho salmon at the value of three and one-quarter cents each, and so be paid, but defendant has refused to credit them with any number in excess of 1,200 each, and such Red or Coho salmon in number 4,500 Red or Coho salmon, in value $146.25 to each of the libelants, defendant has refused to either credit each of the libelants with or to pay any of the libelants therefor or any part thereof, and the whole of said sum remains unpaid.

VII.

That a reasonable compensation to each of the libelants under the said contract of hiring depended upon defendant taking from each of the libelants all of the Red or Coho salmon that each could catch at said river, and that defendant would do so was the principal inducement for each of the libelants entering into the said contract of hiring.

VIII.

That by reason of the premises, libelants are each entitled to have and recover of the defendant the sum of four hundred and thirty-eight and 75/100 ($438.75) dollars, none of which has been paid.

IX.

Libelants allege that it would be and was and is impractical or extremely difficult to fix the actual damages suffered by each of the libelants by reason of the failure of defendant to take from them the salmon tendered by each of the libelants to defendant on the 5th day of July, 1918, and his not taking them until the 6th day of July, 1918. [8]

X.

That said Kwichak river in Alaska is on Bristol Bay, Alaska, and the cannery of defendant where libelants worked for him is what is known as a Bristol Bay Cannery, and was such and so known at all of the times herein stated.

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelants pray that process in due form

of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said defendant L. A. Pedersen, and that he may therein be cited to appear and answer under oath all and singular the allegations aforesaid, and that libelants may have such other and further relief as the Court is competent to give in the premises.

R. PAULSEN,
Libelant.

All of the Other Libelants in the Caption Hereof Named.

By H. W. HUTTON,
Their Proctor.

H. W. HUTTON,
Proctor for Libelants.

United States of America,
Northern District of California,—ss.

R. Paulsen, being first duly sworn, deposes and says as follows: I am one of the libelants above named; I have read the foregoing libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

R. PAULSEN.

Subscribed and sworn to before me this 9th day of October, 1918.

[Seal] MARGUERITE S. BRUNER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [9]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. ——.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

Exceptions to Libel.

To the Honorable MAURICE T. DOOLING, Judge of the Above-entitled Court:

The exceptions of the defendant, L. A. Pedersen, to the libel herein, alleges as follows:

I.

That said libel does not state facts sufficient to constitute a cause of action against this defendant, in favor of any of the libelants therein named.

II.

That the first alleged cause of action in said libel, set forth in paragraphs I, II and III thereof, does not state facts sufficient to constitute a cause of action against this defendant, in favor of any of the libelants therein named. [10]

III.

That the second alleged cause of action in said

libel, set forth in paragraphs V, VI, VII, VIII and IX thereof, does not state facts sufficient to constitute a cause of action against this defendant, in favor of any of the libelants therein named.

IV.

That this Court has no jurisdiction of the subject matter of either of the causes of action alleged in said libel.

Wherefore, defendant prays that said libel may be dismissed, with costs to this defendant.

PILLSBURY, MADISON & SUTRO,
A. E. ROTH,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 16, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,
Libelants,

vs.

L. A. PEDERSEN,
Defendant.

Opinion and Order Sustaining Exceptions to Libel.

H. W. HUTTON, Esq., Proctor for Libelants.
PILLSBURY, MADISON & SUTRO, and A. ROTH, Esq., Proctors for Defendant.

Libelants are seamen and fishermen who worked

as such for respondent in Alaska. They have two causes of complaint: First,—that respondent could not handle more than 1,200 salmon per day of twenty-four hours, while they could have caught 1,500 within that period, and second,—that respondent did not credit them with a sufficient number of additional salmon, because of delay in unloading their boats.

It appears from the libel that respondent was by the terms of the contract empowered to limit the number of salmon that he was bound to pay for to 1,200 in each twenty-four hours. That number apparently he did receive and pay for. It is not averred that libelants caught and tendered to him at any time any greater number than this, but it is averred that if he had been prepared with the number of beachmen that he had agreed to furnish he would have been able to take 1,500, which they could have caught. But as he was authorized to limit the catch to 1,200 and apparently did so, [12] the fact that he could not handle more, or that libelants could have caught more becomes immaterial, and no recovery can be had for the uncaught fish.

The contract provided further that each boat detained from delivering salmon for more than six hours should be credited with 25% additional salmon over the number delivered from it, and for each further hour's delay, an additional credit of 25% should be given. The libel avers that the boats were detained from delivering for twenty-four hours, and should have been credited with 5,700 additional salmon, whereas they were in fact credited with only 1,200. But by this detention they were prevented

from fishing for but twenty-four hours, and for that period they were credited with 1,200 salmon, the total number that they could have received pay for had they had not been prevented from fishing.

The contract cannot reasonably be so construed as to allow them nearly five times as many salmon in the twenty-four hours during which they were prevented from fishing, as they could have been paid for had they worked.

I do not think the libel discloses any undischarged liability on the part of respondent, and the exceptions will therefore be sustained.

January 15, 1919.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 15, 1919. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [13]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Wednesday, the fifteenth day of January, in the year of our Lord, one thousand nine hundred and nineteen.

No. 16,462.

FRANK ALIOTO et al.

vs.

L. A. PEDERSEN.

Minute Order Sustaining Exceptions to Libel.

Pursuant to order this day filed, it is ordered that exceptions to libel filed herein be and the same are hereby sustained. [14]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

Final Decree.

Defendant's exceptions to the libel in the above cause, having been sustained, and libelants declining to amend their said libel, it is hereby ordered that said libel be and the same is hereby dismissed, with costs, to the defendant.

Dated February 25, 1919.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Feb. 25, 1919. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Entered in Vol. 8, Judg. and Decrees, at page 435. [15]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

Notice of Appeal.

The defendant above named and his proctors will please take notice: That libelants in said above-entitled cause hereby appeal to the United States *Circuit of* Appeals for the Ninth Circuit, from the final decree rendered, given and made in said cause on the 26th day of February, 1919, and from each and every part and the whole of said decree.

To the Defendant Above Named and to Messrs. Pillsbury, Madison & Sutro and A. E. Roth, Esqs., Proctors for Defendant.

Yours etc.,

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Copy of the within Notice of Appeal received this 1st day of March, 1919.

A. E. ROTH,
PILLSBURY, MADISON & SUTRO,
Proctors for Defendant.

Filed Mar. 1, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

Assignment of Errors.

I.

The Court erred in finding and deciding that defendant was empowered under the terms of the contract to limit the number of salmon that he was bound to pay for to 1,200 in each twenty-four hours.

II.

The Court erred in not finding and deciding that defendant was bound under the terms of the contract of hiring to employ no less than three beachmen for every line of canning machinery for tall cans operated by him.

III.

The Court erred in not finding and deciding that defendant was bound to comply with all of the terms of the contract of hiring set forth in the libel in order to allow each of the libelants a maximum catch of salmon.

IV.

The Court erred in finding and deciding that

what the Court found as defendant's right to limit the amount of salmon that he was required to take under the contract of hiring to 1,200 each twenty-four hours rendered noneffective the parts of said contract of hiring that required him to employ no less than three beachmen for each line of canning machinery operated by him.

V.

The Court erred in finding and deciding that the following language [17] in the contract of hiring set forth in the libel herein, to wit:

> "If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given. Boats to report at time of arrival at receiving station. This same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station."

—could not be so construed as to allow libelants to be credited with the amount of salmon the language of said part of contract of hiring says they shall be credited with.

VI.

The Court erred in not finding and deciding that the said language in said contract of hiring was intended by the parties thereto to be and was liquidated damages and the measure of defendant's liability for a breach thereof.

VII.

The Court erred in not finding and deciding that if the said damages set forth in said part of said contract of hiring was a penalty that the amount of damages suffered by each of the libelants by a breach thereof was a subject matter for proof.

VIII.

The Court erred in the absence of proof in finding and deciding that no one of the libelants could recover from defendant for a breach by him of said part of said contract of hiring in excess of 1,200 salmon and the value thereof for each twenty-four hours they were detained from delivering salmon.

IX.

The Court erred in arbitrarily fixing the damages suffered by each of the libelants for detention in delivering salmon as alleged in their libel to 1,200 salmon in each twenty-four hours, in the absence of proof as to what the actual damage was.

X.

The Court erred in finding and deciding that in no event could [18] any of the libelants be credited with more than 1,200 salmon for the detention complained of in their libel herein.

XI.

The Court erred in not finding and deciding that defendant was bound by the measure of damages set forth in said contract of hiring as set forth herein and shown in libelant's libel.

XII.

The Court erred in sustaining the first exception of defendant to libelants' libel, and also in sustain-

ing the second of such exceptions.

XIII.

The Court erred in finding and deciding that libelants' libel did not state a cause of action.

XIV.

The Court erred in finding in effect that a breach by defendant of that part of the contract of hiring set forth in the libel, that required him to employ three beachmen for each line of canning machinery operated by him was immaterial.

XV.

The Court erred in not giving full effect to all of the parts of said contract of hiring, and in finding and deciding that one part of said contract not in conflict with another part rendered that other part of no force and effect.

XVI.

The Court erred in not overruling each of the exceptions filed by defendant to libelants' libel herein.

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Copy received this 19th day of March, 1919.

PILLSBURY, MADISON & SUTRO,
Proctors for Defendant.

Filed Mar. 20, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

[Endorsed]: No. 3320. United States Circuit Court of Appeals for the Ninth Circuit. Frank Alioto et al., Appellants, vs. L. A. Pedersen, Appel-

lee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Received March 20, 1919.

F. D. MONCKTON,
Clerk.

Filed March 29, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN ADMIRALTY.

FRANK ALIOTO et al.,
Libelants and Appellants,

vs.

L. A. PEDERSEN,
Defendant and Appellee.

Designation of Appellants Under Rule 23.

Appellants designate the following parts of the record on appeal herein upon which they intend to rely, and which they think necessary to be printed for the consideration thereof to wit:

1. The libel.
2. The exceptions to the libel.

3. The minute order sustaining the exceptions to the libel.
4. The decree.
5. The assignments of error.
6. The notice of appeal.

H. W. HUTTON,
Proctor for Appellants.

[Endorsed]: No. 3320. In the United States Circuit Court of Appeals for the Ninth Circuit. In Admiralty. Frank Alioto et al., Appellants, vs. L. A. Pedersen, Appellee. Designation of Parts of Record Which Appellants Think it Necessary to Print. Filed Apr. 2, 1919. F. D. Monckton, Clerk.

Copy received this 29th day of March, 1919.

PILLSBURY, MADISON & SUTRO,
E. A. ROTH,
Proctors for Appellee.

No. 3320

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al., *Appellants,* vs. L. A. PEDERSEN, *Appellee.*	

APPELLANTS' REPLY BRIEF.

H. W. HUTTON,
Proctor for Appellants.

FILED

No. 3320

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al.,
Appellants,

vs.

L. A. PEDERSEN,
Appellee.

APPELLANTS' REPLY BRIEF.

The matters urged on page 2 of appellee's brief might be taken advantage of on special exceptions, not on general. The libel states a cause of action.

What appears on page 3 is met by the mere statement that, if appellee had the right to put appellants on a limit of 1200 salmon per day, it was conditional on his first complying with those terms of the contract inserted to give appellants fair earnings; but it does not appear on the face of the libel that he had that right.

If appellee had the right to put appellants on a limit of 1200 salmon per day, the day must be measured by an ordinary day's working time of 8 hours.

Paragraph V, of libel (page 7 of Transcript), shows appellants were on duty 24 hours and, under the theory applied in this case, they were entitled at least to a credit of 3600 salmon instead of 1200.

Stennick v. Jones, 252 Fed. 345, cited on page 6 of appellee's brief, says:

> "and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

Damages based on a catch of fish are certainly of the most uncertain character, that is shown on the face of the contract as:

Not knowing whether appellants would be on or off the limit the language is based on off the limit and there is inserted:

> "The same rule to apply when boats are on the limit."

Now, in the nature of things, being unable to ascertain how many salmon could or would be caught during a period of detention, the basis of computation. the only one that could be used, was, What was in the boats when detention commenced? That might have been 200 or 2400, depending on whether fishing was good or bad.

An analysis of the percentages shows that they were intended to mean, and do mean, actual compensation for lost time, which of course eliminates any idea of a penalty.

For instance if a boat offered 1200 or any other number of salmon for delivery it would take exactly

nine (9) hours' detention (about an ordinary day's work) for the percentages to equal the number offered. If detained longer, common justice dictates that the men should be paid for the time.

If a boat off the limit, however, offered 200 salmon it would take twenty-nine (29) hours' detention for the percentages to equal 1200. The employer, however, would pay for 1200 for 24 hours' detention.

If the decision appealed from is correct, though, a boat offering 2400 salmon after 24 hours' detention would lose 800 in delivery and receive no percentages for detention, that could not have been the intention.

We are of the opinion that the construction given by the lower court to the words *at least* 1200 should be paid for each 24 hours, is that *not more* than 1200 should be paid for in that time, the decision being that a man cannot earn pay for more than 1200 salmon in 24 hours no matter how many hours of the 24 he works. But who could have told in May, 1918, or even on July 4, 1918, what the actual damages in this case would be? Not being able to tell in advance they must be deemed liquidated.

The contract was made by parties presumably familiar with the business, was evidently carefully studied and signed before a United States official.

The damages are less than would be allowed in any other calling as follows:

Eight hours is an ordinary working day. To prevent men from being called upon to work in excess

of the capacity of the human frame, extra work is always made expensive by charging and allowing in occupations, such as this, double time. In this contract for the first six hours (¾ of a day) the

Allowance is 25%
For the 7th and 8th hours (25% each).......... 50%

Total for an ordinary working day.......... 75%

For the next 16 hours 25% each hour or..........400%

Exactly double time for two working days of eight hours each, so appellants, for the 24 hours' detention in any calling, would be entitled to one full day and two double days or five days' pay. Under this contract they get four and three-quarter days' pay. Of course the amount in dollars seems large; but it must be remembered that libelants had to go to Alaska to catch fish, and also return after they were caught. The only opportunity of making fair earnings depended on the days' salmon run in Alaska—usually about 29 in a service of a little over five months duration.

If the contract had read $5.00 per hour it would have been an arbitrary amount. In this case, however, the attempt was and the parties did use probable earnings based on what had already been earned. No other method was open to them.

If appellee had detained appellants fifteen minutes less than six hours about two-thirds of a day would have been lost to appellants and appellee would have paid nothing for it. He ought not to

complain of the percentages if he voluntarily, or by his own act, increased them by increasing the number of hours detention.

We think, however, that the six hours was inserted to enable appellee to take the salmon in the event that all of the appellants should offer at the same time. It does not indicate a penalty.

We submit the damages were of a most uncertain character and agreed upon in advance after an evident careful consideration and computation, and there is no evidence of a penalty apparent on the face of the language. It is clearly otherwise and is purely compensatory.

Dated, San Francisco,
June 2, 1919.

Respectfully submitted,

H. W. HUTTON,
Proctor for Appellants.

No. 3320 //

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al.,	
	Appellants,
vs.	
L. A. PEDERSEN,	
	Appellee.

BRIEF FOR APPELLEE.

PILLSBURY, MADISON & SUTRO,
A. E. ROTH,
Proctors for Appellee.

FILED
MAY [illegible]
F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al., *Appellants,* vs. L. A. PEDERSEN, *Appellee.*	No. 3320

BRIEF FOR APPELLEE.

This is an action by some 190 fishermen to recover the sum of $438.75 each from the appellee. The libel sets up two causes of action. The lower court sustained exceptions to both causes of action and this is an appeal from the court's ruling sustaining the exceptions.

Argument.

THE FIRST CAUSE OF ACTION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DAMAGES.

As grounds for the first cause of action it is alleged that under the contract of hiring between the appellants and appellee, the appellee agreed to pay the ap-

pellants three and a quarter cents for each Red or Coho salmon offered for delivery at his cannery in Alaska; that the contract further provided that the canneries should employ no less than three beachmen for every line of cannery machinery for tall cans operated; that the appellee had eight lines of cannery machinery, and employed at no time in excess of seventeen men; that his machinery was defective, in that it was constantly getting out of order, and for that reason appellee was unable to take the fish from appellants as they caught them, and their boats in which they caught salmon, were detained in making deliveries. That if the appellee had had proper machinery and a sufficient number of beachmen to operate the machines, he would have been able to have taken at least 1500 fish per day for 30 days.

The libel does not allege that the appellee agreed to operate any particular number of lines of canning machinery, or that he was at fault in providing defective machinery, but simply alleges that he had eight lines of canning machinery, and that it was defective in this, that it was constantly getting out of order.

It is difficult to determine from the allegations of the libel, whether the loss, which the appellants contend that they sustained by reason of profits which they would have received had the appellee accepted 1500 fish per day, resulted from the failure of appellee to maintain any particular number of canning machines and to keep such machinery in proper order, or by reason of a failure to provide a sufficient number of beachmen. Neither does the libel allege that the libelants

caught and tendered to the libelee at any time, any greater number of fish than 1200 per day.

It appears from the allegations of the libel, that the appellee by the terms of the contract, was empowered to limit the number of salmon that he was bound to pay for, to 1200 fish in each 24 hours. There is no contention that the appellee did not accept and pay for this number of fish, but on the contrary it appears that the appellee did take at least 1200 fish per day.

Inasmuch as he was authorized to limit the number of fish which he was obliged to accept, the fact that he could not handle more, or that the appellants could have caught any greater number, becomes immaterial.

If the appellants had caught 5000 fish, or any other number of fish per day in excess of 1200, and if the appellee had had sufficient machinery to care for all the fish caught, he would still have had the right, under his contract, to limit the number which he would take and pay for, to 1200 fish per day, and as this is the measure of the amount which the appellants, under any circumstances, could compel the appellee to pay for their services, they certainly state no cause of action for any greater sum by merely alleging that if there had been better facilities for handling the fish, they could have caught more.

The libel does not allege that the contract provided that the appellee would take all the fish that were caught by each of the appellants, but merely states that the taking of all the fish which each might catch was the principal inducement for entering into the contract of hiring.

In view of the express provision of the contract, giving the appellee the right to impose a limit of 1200 fish, counsel's contention that there was an implied agreement to take all the fish that the fishermen might catch, is, of course, untenable. The libel shows that the appellee did take at least 1200 fish per day, and the men certainly knew, when they signed the libel, that their earnings under the limit clause could be confined to this amount. In view of the allegation that at least 1200 fish were taken, any speculation with respect to what might happen under the contract, if the appellee had had no machinery, or had taken no fish, is not in point.

Counsel for appellants' contention that the appellee's right to put the men on a limit of 1200 fish per day could only be exercised when appellants were offering more salmon than he could handle with 24 beachmen at work, is not borne out by the allegations of the libel. A reading of the libel will show that the right to place the men on limit was apparently unconditional. If the appellee had the right to place the men on a limit of 1200 fish at a time when he had sufficient beachmen and sufficient machinery, which right he apparently had, then it is difficult to see how the appellants can be damaged by a failure to furnish sufficient beachmen or sufficient machinery, at a time when they are in fact on the limit.

According to the allegations of the libel the machinery and beachmen furnished were sufficient to care for at least 1200 fish. In view of appellee's right to place a limit of 1200 fish, the only state of facts under which the appellants could be damaged would be where it

appeared that the machinery or the number of beachmen was insufficient to care for some amount of fish less than 1200 fish, and that appellants had tendered such an amount which had not all been taken because of such insufficiency.

THE SECOND CAUSE OF ACTION DOES NOT STATE SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION FOR DAMAGES.

The second cause of action is founded upon the following allegation in the contract of employment:

> "If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given. Boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station."

The libel sets out this provision of the contract, and then states that on the 5th day of July, 1918, the appellants were prevented from delivering fish by reason of the failure to unload their boats for a period of 24 hours, and that by reason of this delay in unloading their boats they each became entitled to a credit of 5700 salmon. The latter figure is arrived at by adding 25% additional to the 1200 salmon which were offered for the first six hours of the delay, and an additional 25% for each hour's delay thereafter.

As pointed out by His Honor, Judge Dooling, in his opinion in the lower court, if the appellants had not

been prevented from fishing by reason of the delay, they could not have received pay for more than 1200 salmon, which amount they were credited with. Since the contract fixes the exact number for which they could have received pay, had they not been prevented from fishing, it is, of course, unreasonable, as pointed out by the lower court, to allow them nearly five times as many salmon as they could have been paid for had they worked.

We respectfully submit that there can be no question but that the clause upon which the second cause of action is based, provides, and was intended by the parties to provide, for a penalty pure and simple, and was not intended to provide for stipulated damages.

In the case of *Stennick v. Jones*, 252 Fed. Rep. 345, at page 353, lately decided by Your Honors, the rule respecting penalties is stated as follows:

> "The principle which controls and as upheld in Sun Printing & Publishing Co. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, is that the intent of the parties is to be arrived at by a proper construction of the agreement; and whether a particular stipulation to pay a sum of money is to be regarded as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

In the recent case of *Board of Commerce of Ann Arbor, Mich. v. Security Trust Co.*, Circuit Court of Appeals, 6th Circuit, 225 Fed. Rep. 454, at 460, the court says:

> "If the contract is construed to mean 'liquidated damages' the recovery for the breach is the sum

> stipulated without proof of actual damage. If it is construed to mean penalty the recovery is only for the actual damage sustained * * * "

In *Sun Printing & Publishing Assn. v. Moore,* 183 U. S., at page 662, the court says:

> "The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not *bona fide,* in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreement ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Thus, Chief Justice Marshall, in Tayloe v. Sandiford, 7 Wheat. 11, although deciding that the particular contract under consideration provided for the payment of a penalty, clearly manifested that this result was reached by an interpretation of the contract itself."

Under these decisions the question to be here determined is "Does this contract when properly construed show an intention to provide a penalty, or does it show an intention to provide liquidated damages?"

One of the first and most important considerations in determining this question is the relation of the amount provided to be paid to the actual damage sustained. In the case of *In re Liberty Doll Co.* (242 Fed. 695, at 701) the court says:

> "Two rules are well established:
>
> 1. That where the sum agreed upon is so great as to be unconscionable, it will be regarded as a penalty.
>
> 2. That where the stipulated amount is disproportionate to presumable and possible damages, or to a readily ascertainable loss, the courts will treat it as a penalty."

We are not unaware of the language used in the case of *Sun Printing & Publishing Ass'n v. Moore* (183 U. S. p. 660), and cited by counsel for appellants in pages 12 and 13 of his brief.

We submit however that even the Sun Printing Co. case is authority for the proposition that the disproportion of the amount to be paid to the actual damage is an important element in determining the intention of the parties. On page 672 the court says:

> "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

This is further indicated by the court's discussion on page 668 of the opinion of the decision rendered in the case of *Ward v. Hudson River Building Co.*, 125 N. Y. 230.

In the case of *U. S. v. United Engineering Co.*, 234 U. S. 236, at 241, the Supreme Court refers to the Sun Printing Co. case and says:

> "Such contracts for liquidated damages when reasonable in their character are not to be regarded as penalties, and may be enforced between the parties." (Citing Sun Printing and Publishing Co. v. Moore, supra.)

This language by the Supreme Court clearly indicates that it does not consider that the Sun Printing Co. case has abolished the rule that there must be a reasonable proportion between the amount to be paid and the actual damage.

In the very well considered case of *Northwestern Terra Cotta Co. v. Caldwell* (8th Circuit, 234 Fed. p. 491, at 498), after quoting from the Sun case Judge Smith says:

> "In all this there is nothing throwing any light upon the question now under consideration, but certain language is used by Mr. Justice White in his very able opinion, which it is claimed applies to the case at bar. In view of the learning displayed in the opinion it is with some hesitancy that we call attention to the fact that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. * * * In the case under consideration, Sun Printing & Publishing Assn. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, if suit had been delayed for substantially 10 years, the usual period of limitations on written contracts, and the owner of the yacht had then brought suit for $500 a day, or for $1,750,000, under the demurrage clause noticed, and the court had held that he was entitled to recover in that amount for the use of a yacht worth $75,000, the case would have been quite in point, but that question was not raised."

Inasmuch as the Sun Printing Co. case was a case of an agreed valuation of property it is no more in point on the facts of this case than it was in the case of *Northwestern Terra Cotta Co. v. Caldwell,* supra.

The above analysis by Judge Smith of the decision in the Sun case finds support in the case of *McCall v. Deuchler,* 174 Fed. at page 134, in which Judge Hook says:

> "This is not a case of an agreed valuation of property, like that of Sun Printing and Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; nor is it one in which the amount of actual damage is difficult of ascertainment. The contract was the common one of sale and purchase of articles of trade, for the breach of which the law prescribes a clear and definite measure of damages. The provision in the contract ignores this measure altogether, and fixes an arbitrary amount which is grossly in excess of all loss that could possibly have been sustained. This is manifest from the face of the contract itelf. Extrinsic evidence is not necessary to disclose it".

In the case at bar the contract fixes the amount which the appellants could earn during the time they were delayed, to wit, pay for 1200 fish, and this is manifest from the contract itself. No extrinsic evidence is necessary to show the unconscionable disproportion between the amount claimed and the actual damages. In the McCall case the law fixed a definite measure of damages, here the limit clause of the contract fixes the measure.

When we apply the test of disproportion of amount to be paid to the amount of damage sustained, in the

case at bar, it is at once apparent that the parties must have intended a penalty, for as pointed out by the lower court, the amount stipulated to be paid is over four times the amount which the appellants could possibly sustain as damages. If the appellants had worked during the time they were delayed, they could only have earned pay for 1200 fish for each 24 hours, and the actual amount of their damage is limited to pay for this amount of fish. It therefore appears on the face of the contract that the amount claimed, to wit, credit for 5700 fish, is out of all proportion to the ascertainable loss, to wit, 1200 fish.

Another circumstance showing intention to provide a penalty is the fact that the contract makes a distinction between the first six hours delay and subsequent hours. There is no apparent reason why subsequent hours should be placed on a different basis than the first six hours so far as the amount of damage sustained is concerned, which indicates that the parties were not attempting to fix the amount of damage.

The fact that the contract provides that the rule shall apply when the boats are on the limit, conclusively proves the parties intended a penalty, and not liquidated damages. Inasmuch as the appellee was compelled to pay for at least 1200 fish every 24 hours, whether he took them or not, when the boats were on a limit, it is apparent that the men could suffer no damage at all by delay in taking the fish, and the provision for extra credit is therefore a penalty pure and simple.

It is no answer to the above proposition to say that the men were obliged to discharge their boats once a day, and to deliever their salmon in good condition. If they were prevented from delivering once each day, or from delivering salmon in good condition, by reason of appellee's delay, they certainly would be excused from complying with these conditions, and would be entitled to their limit, notwithstanding their failure to comply therewith.

While it is well settled that the mere use of the terms "penalty," "liquidated damages," etc., or the omission of these terms, is not conclusive as to the true construction of the contract, yet the use or omission of such words is a circumstance entitled to consideration in arriving at the intention of the parties.

In the case of *Blewett v. Front Street Cable Rwy. Co.*, 51 Fed. Rep. at 627, His Honor, Judge Gilbert, says:

> "It is true the bond by its language does not declare that $18,000 shall be deemed liquidated damages in case of breach. This omission, though a strong circumstance, is not a controlling consideration in construing the bond. The court may construe the penalty as liquidated damages in cases where the parties have not nominated it. The construction will depend upon the intention of the parties, to be ascertained from the whole tenor and subject of the agreement."

In the case at bar the contract makes no reference to stipulated or liquidated damages, and, as pointed out by His Honor, Judge Gilbert, this is a strong circumstance to be considered in construing the contract.

For the foregoing reasons we respectfully submit that the provisions of the contract upon which the second cause of action is based, when properly construed, show an intention to provide a penalty which is sought to be recovered and that the exceptions to both causes of action were properly sustained.

Dated, San Francisco,
May 24, 1919.

Respectfully submitted,

PILLSBURY, MADISON & SUTRO,
A. E. ROTH,
Proctors for Appellee.

No. 3320

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al., *Appellants,* vs. L. A. PEDERSEN, *Appellee.*	}

BRIEF FOR APPELLANTS.

H. W. HUTTON,
Proctor for Appellants.

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[illegible] Walsh Printing Co., San Francisco

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United States Circuit Court of Appeals

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IN ADMIRALTY

FRANK ALIOTO et al., *Appellants,* vs. L. A. PEDERSEN, *Appellee.*	}

BRIEF FOR APPELLANTS.

I.

STATEMENT OF FACTS.

This is an appeal taken by libelants, about 190 in number, from a final decree rendered by Division No. 1 of the United States District Court, Northern District of California, the decree being rendered on the sustaining of general exceptions to the libel.

The libel sets forth that appellants were each hired by the appellee in San Francisco, California, to serve as seamen and fishermen on a voyage to Alaska to catch salmon, and that shipping articles were signed before the United States Shipping

Commissioner at the Port of San Francisco for the engagement, and that among other things agreed upon were the following, briefly:

That appellee agreed to pay each of the appellants three and one-quarter cents for each red or coho salmon offered for delivery at the Kwichak River in Alaska.

That the shipping articles contained the following.

> "Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated."

That appellee had eight lines of such canning machinery but at no time employed more than seventeen beachmen; that his canning machinery was also defective, and for that reason he was never at any time able to take more than 1200 salmon per day from each of the libelants when if he had employed a sufficient number of beachmen and his canning machinery had not been defective he would have been able to take 1500 salmon per day from each of the libelants and their boats were detained in deliveries thereby and they would have each earned $292.50 under their contract more than they did earn.

That a reasonable compensation to each of the appellants under their contract of hiring depended upon appellee taking from each of the appellants all the salmon each could catch at said river, and that appellee would do so was the principal inducement for each of them to enter into the said contract.

That the contract of hiring also contained the following:

> "If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station."

That the limit mentioned was an obligation on the part of appellee to pay for at least 1200 salmon every twenty-four hours, whether he took the same or not.

That while appellants were in their boats with undischarged salmon they were compelled to stay and were unable to attend to their personal wants, and that was one of the reasons why that matter was inserted in the contract also to prevent fish caught from becoming spoiled by reason of their not being canned in proper time.

That on the 5th day of July, 1918, appellants each tendered to appellee 1200 red or coho salmon within the terms of their contract; but appellee failed to take them for 24 hours; by reason of which each of the appellants became entitled to receive of appellee credit for 5700 red or coho salmon, or $146.24. That appellee had credited them with 1200 salmon each, but refused to credit any with any more.

It is further alleged that it would be and was impractical or extremely difficult to fix the actual damage suffered by each of the appellants by reason of his not taking the salmon according to contract and not taking them until the 6th day of July, 1918, when he should have taken them on the 5th.

It is also alleged that the Kwichak River is on Bristol Bay in Alaska.

II.

ASSIGNMENTS OF ERROR.

Appellants rely on each of their assignments of error, which are however very full, briefly their position is.

That the court erred in entirely disregarding the first language of the contract set out in the libel.

And it also erred by deciding, in the absence of proof at least, that in no event could appellants receive more than 1200 fish or their value, for the failure on the part of appellee to take salmon for twenty-four hours after the time they were offered for delivery, when the contract said they should each receive a credit of 5700.

That it also erred in finding and deciding that appellee had the right to place appellants on a limit of 1200 fish per day, in any event.

III.

ARGUMENT.

The following language in the contract was undoubtedly inserted therein for some purpose, and it would be the court's duty to give it effect unless it was meaningless, to wit:

> "Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated."

Its purpose is clear from the libel, as it is alleged that by reason of the fact of defective machinery and an insufficient number of beachmen, the earnings of appellants were each reduced $292.50 for the season, as appellee was not able to take fish as appellants could have caught them, and caught them,

A reasonable compensation to each of the appellants, it is alleged, depended on appellee taking all the salmon each could catch. In the absence of any stipulation in the contract it would be implied that when one person left San Francisco to fish for another in Alaska, that the latter would take all of the salmon the other could catch. If he could refuse to take all he could refuse to take any and the trip up and down would be lost to the employee; but it is alleged that the fact that appellee would take all each appellant could catch was the principal inducement for their signing the contract.

And upon exceptions that allegation must be taken as true.

Appellants were entitled to 3 beachmen for each line of canning machines. They were seven short—

only sufficient for five and two-third lines when appellee had eight lines. It can easily be seen that the canning equipment was short as, if there had been sufficient men, eight lines could have run and the canning capacity would have increased 29.70 per cent.

Supposing appellee had but three men, and was thus able to operate but one line of canning machines; the earnings of appellants would have been still further reduced. Supposing he had none, and appellants were unable to earn anything at all, would the above language be still held meaningless? It must mean something, and it means nothing else than that appellants were entitled to eight lines of proper canning machinery, with sufficient men to operate them, and were entitled to deliver all of the salmon that that quantity of machinery operated by that number of men could can. Short of that their contract was violated and, if they suffered, they are entitled to damages. The allegations of the libel show a breach and damage.

In an expedition such as this is shown to be, it is unquestionably the duty of the employer who furnishes the instrumentalities of the service to furnish adequate means to enable a full earning capacity. If he falls short of that he has not performed his duty.

In the following cases, codfishing voyages, where of course the employer has to furnish salt to cure the fish, there was a shortage of salt, and his Honor the late Judge Hofman held that the seamen were

entitled to damages by reason of being unable to make a proper catch. There was nothing in the contracts in those cases that said the vessel should furnish so much salt or so many men—that is always implied.

The Bark Domingo, 1 Sawyer 182;
The Schooner Page, 5 id. 299.

The court held appellee had the right to put the men on a limit of 1200 fish per day. That does not appear on the face of the libel and, if it did, that right could only be dependent on appellee first doing all that was required of him to prevent the earning capacity of the appellants being reduced, that right could not be an absolute right, but dependent on a first fulfilment of all of appellee's obligations.

If appellee had the right to place appellants on a limit of 1200 salmon per day, it would be an option only to be exercised when appellants were offering more salmon than he could handle with 24 beachmen at work, but if he were unable to handle more than the 1200 by reason of the fact that he himself was in default on that part of the contract, he would not have the right to exercise the option. If he did he would enforce one part of the contract by violating another, or give himself the right by violating another part. The learned lower court in this case seems to have disregarded one part of the contract and given absolute effect to another. Contracts must be construed as a whole—all parts must be given effect.

The proper rule of construction of the parts of the contract in issue here is well stated in the case of

Russ Etc. Co. v. Muscupiable Co., 120 Cal. 521, 526.

> "The plaintiff must treat all the preceding agreements of the defendant, which remain unperformed, *as concurrent,* since he cannot enforce the performance of defendant's part of a contract while he is in default in the performance of his part of it".

That is exactly what the court said could be done in this case. Assuming appellee had an option, it held that he could exercise the option, when he was in default in such a manner as to create the necessity of such exercise.

We submit that the condition requiring three men to each line of canning machinery and proper machinery were conditions precedent to the option to place on a limit and if the option could not be exercised without the violation of the condition it could not be exercised at all. Conditions precedent must be strictly performed.

IV.

THE COURT ERRED IN DECIDING IN EFFECT THAT IN NO EVENT COULD APPELLANTS RECOVER FOR MORE THAN 1200 SALMON FOR DENTENTION.

The court evidently labored under the belief that the language in the contract was a penalty and not liquidated damages.

Whatever the common law or that of the different states may be on that subject, we must rely on what the United States Supreme Court says upon the subject.

It is needless for us to go into the history of the doctrine that under an English statute, which of course became a part of a contract, a court might fix the damages different to those stipulated in the agreement. The modern rule in the courts of the United States is to the effect that if people make contracts there is but one thing left for the courts to do—that is to enforce them according to their terms.

As to whether the terms of this contract is a penalty or liquidated damages it makes no difference whether the language describes it as a penalty or liquidated damages. The courts will, when it is necessary so to do, determine what it really is.

In this case, however, the amount to be paid is clearly *liquidated damages.*

There is one unvarying rule to the effect that where the amount is based upon the non-performance of *one act,* it must be treated as liquidated or agreed damages, and not as a penalty.

There is but one act here—the failure to take fish offered on July 5, 1918.

In the case of

U. S. v. Rubin, 227 Fed. 938.

The court said on page 942:

> "The rule is that, where the parties to a contract have agreed that a sum shall be one payable on a single event, such sum may be regarded as liquidated damages, but where the sum is made payable to secure the performance of several stipulations of varying degree of importance, it is clear the stipulated sum must be regarded as a penalty, and not as liquidated damages for a part default.

In the case of Sun Printing and Publishing Co. v. Moore, 183 U. S. page 667:

> "In Strickland v. Williams (1899), 1 Q. B. 382, Lord Justice A. L. Smith appears to have stated an additional class to those mentioned by Jessel, M. R. He said p 384): 'In my opinion, it is the law that where payment is conditioned on one event, the payment is in the nature of liquidated damages'. This but seems to reiterate the proposition of Justice Patterson in Price v. Green, previously cited. It was undoubtedly meant that the 'event' should not be the mere non-performance of an *ordinary* agreement for the payment of money. See, also, per Bramwell, B, in Sparrow v. Paris (1862), 7 Hurl, & N, 594, 599.
>
> "Now the stipulation here being considered, obviously would be within the last class, for it was a promise to pay a stipulated sum on the breach of a covenant to return the yacht to the owner."

It is thus clear that the contract provides for liquidated damages. That being the case we respectfully state to the court that the law is that in the absence of a statute on the subject of a penalty, and we have no such statute here, it is the duty of a

court, in the absence of fraud or mistake, to enforce a contract for damages according to its terms.

The whole history of the law upon this subject is clearly set forth in

Sun Printing & Publishing Assn v. Moore, 183 U. S. 642.

All the different States of the Union have laws similar to the Statute 8 & 9 William III, c II. California has in Civil Code Secs. 1670-1671. This court, however, and the Supreme Court of the United States has recently held that the statutes of this State have no force or effect in a court of admiralty. But even under section 1671 Civil Code this contract would be enforced according to its terms.

Having no statute upon the subject this court is in the same position that the courts of England were prior to the passage of the Statute of William III.

The whole matter is fully reviewed in the above case, Sun Printing Assn. v. Moore, we quote from the syllabus as follows:

> "The naming of a stipulated sum to be paid for the non-performance of a covenant, is conclusive upon the parties in the absence of fraud or mutual mistake."
>
> Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement.

On the first of the above matters, this contract was entered into before a United States official.

Neither fraud nor mistake appear, and the court must presume that the stipulation in question was the inducement for appellants to sign the contract, and that if it had not been in the agreement they would not have entered into the agreement at all.

On the second proposition, it is alleged in the libel that it was impracticable, etc., to fix the actual damage, etc. That abundantly appears from the fact that no one could tell in advance how many fish he would catch between the 5th and 6th days of July, 1918.

In the Sun Printing case, the stipulation for damages for failure to return the yacht, and the amount to be paid in case of detention, was capable of estimation as the value of a yacht could have been ascertained by appraisement, and detention could easily be fixed on testimony of how much she was worth per day at that time. Still the court upheld the values agreed upon for non-performance of the contract, saying on pages 659, 660:

> "Upon the trial, The Sun Association introduced some evidence tending to show that the value of the yacht was a less sum than $75,000 and it claimed that the recovery should be limited to such actual damage as might be shown by the proof. The trial judge however, refused to hear further evidence offered on this subject, and in deciding the case disregarded it altogether. The rulings in this particular were made the subject of exception and error was assigned in relation thereto in the Circuit Court of Appeals. That court held that the value fixed in the contract was controlling, especially in view of the fact that a yacht had no market value.

> The complaint, that error in this regard was committed, is thus stated in argument: 'The naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that, *if the amount is disproportionate to the loss,* the court has the right and duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty even though it is specifically said to be liquidated damages.' Now it is to be conceded that the proposition thus contended for finds some support in expressions contained in some of the opinions in the cases cited to sustain it. Indeed, the contention but embodies the conception of the doctrine of penalties and liquidated damages expressed in the reasoning of the opinions in Chicago, etc. (cases cited) * * * "where actual damages can be assessed from testimony," the court must disregard any stipulation fixing the amount and require proof of the damage sustained. *We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and is not sanctioned by the decisions of this court'.* (Italics ours) And we shall, as briefly as we can consistently with clearness, proceed to so demonstrate."

The court then demonstrates the doctrine in the pages following. It saying on pages 669, 670:

> "A court of law possesses no dispensing powers. It cannot inquire whether the parties have acted wisely or rashly, in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules that law has fixed as to parties, and there has been no fraud, circumvention or illegality

> in the case, the court is bound to enforce the agreement. Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance, a measure of compensation, however extravagant it may be, for a violation of their covenant (they surely may after it has accrued), without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and regarding the intent of the parties, it is not to be doubted but that the sum of $3000.00 was fixed by them 'mutually and expressly' as they say, 'as the measure of damages for the violation of the covenant, or any of its terms or conditions'. If it be said that the measure is a hard one, it may be replied, that the defendants should not have stipulated for it; or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely, the faithful fulfillment of their agreement."

Defendant (appellee) could easily have prevented liability by unloading the salmon. He did not do so and there is nothing on the face of the libel that indicates why he should not be held for what he agreed to pay in the event that he did not do so.

We respectfully call the court's attention to pages 672, 673, 674 of the opinion, where the court holds:

> "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive

disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract,* and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security.

In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if *it* had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise or mistake, and stated no facts claimed to warrant a reformation from the agreement. Its alleged right to have eliminated from the agreement the clause in question, for that is precisely the logical result of the contention, was asserted for the first time at the trial by an offer of evidence on the subject of damages."

The lower court went even further in this case. It construed plain and unmistakable language that reads appellants should receive a credit of twenty-five per cent for the first six hours delay, and twenty-five per cent for each hour thereafter, to

mean that but four hours should be credited, *and in the absence of proof* that libelants could not have caught more than 1200 salmon.

The language of the contract is again clear, *that whether the men were on the limit or not,* they should be credited with the above percentage.

This is not a case within the first of the language in the last above quotation mentioned, but one where the parties in advance solemnly agreed that a certain amount should be paid for the breach mentioned. It was not a trivial breach, no question of disproportion appears, the intent of the parties is clear as to what the damages should be, appellants were about five months on the voyage, the opportunity to catch salmon only lasts about 29 days; all of that must be held to have been considered by the parties. Again, the fact that the language applies when the men are on the limit shows it was carefully considered. If the limit option is properly exercised, a man may be on the limit one day and off the next. Again, the men have the right to leave their boats; human nature requires that, and, as we have said, who can say in advance how many salmon these men could have caught between the 5th and 6th days of July, 1919. The language can be construed in no other light than enforceable liquidated damages. If we consider an admiralty court a court of equity, the following rule applies (Sun Printing Co. etc., page 661):

> "Courts of equity *will relieve against a penalty,* upon a compensation but where the covenant is to pay a particular *liquidated* sum, a court

of equity can not make a new covenant for a man; nor is there any *room for compensation or relief,* * * * Equity declines to grant relief because of inadequacy of price, etc."

For a further very instructive case we cite:

U. S. v. Bethlehem Steel Works, etc., 205 U. S. 119.

The language of the lower court was as follows (Transcript page 12):

"The contract cannot reasonably be so construed as to allow them nearly five times as many salmon in the twenty-four hours during which they were prevented from fishing, as they could have been paid for had they worked."

We respectfully submit that the contract reads that appellants should have that many salmon credited to them. For aught that appears they could, and, in fact, sometimes they do, catch about that number in that time. Again, they were personally inconvenienced. It is against the law of Alaska to allow salmon to spoil. Salmon will spoil when kept too long. All those things were in the minds of the parties when appellee agreed to credit appellants with the salmon mentioned in the stipulation.

There is nothing to show the number of fish to be so credited was exorbitant if that was material. That could only be shown, if it was a fact, by proof. Quoting again from the Sun Printing Association case, on pages 673, 674:

"When the parties to a contract, in which the damages to be ascertained growing out of a breach, are uncertain in amount, mutually agree

> that a certain sum shall be the damages, in case of failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts, that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damages, probably a court of equity may relieve; but a court of law had no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties," etc.

Of course we find the language of the court to be on the construction of the language. We however submit that the language of the stipulation is clear, unambiguous and unequivocal. We assume, however, that the court construed it in the light of some of the decisions that hold such language to be a penalty. The language is clearly not a penalty, but agreed damages as we have stated.

But in no event, could the amount of damage recoverable be fixed on exceptions as the court did, that leads us to the following proposition.

V.

IN THE ABSENCE OF PROOF THE COURT COULD NOT DETERMINE THAT 1200 SALMON OR THEIR VALUE WAS ALL THE DAMAGE APPELLANTS COULD SUFFER.

The court, however, did so decide, that appellants could not recover for more than 1200 salmon, although the contract reads plainly to the contrary.

Of course, the court holding that was what the contract meant, appellants were powerless to do anything further. The only thing they could do was to appeal.

In the case of

U. S. v. Rubin, 227 Fed. 938.

The action was on a bond given to the U. S. for the appearance of person in an immigration case. The government moved for a judgment on the pleadings, which the court properly held was in the nature of demurrer. The rule was denied, the court holding that proof should be taken on damages and that question tried.

If we entirely disregard the foregoing decisions of the Supreme Court of the United States, we are still within the following sound doctrine:

Los Angeles O. G. Assoc. v. Pacific S. Co., 24 Cal. Appellate 95, page 99:

> "The rule stated in section 1670 of the Civil Code, must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671. (Long Beach City S. Dist. v. Dodge, 135 Cal. 401.) Plaintiff alleged 'that it would be and was and is impracticable or extremely difficult to fix the actual damages suffered by the plaintiff by reason of said breach, to wit: the abandonment by the said Tajiri of the said contract'. This, in our judgment, is sufficient to bring the case within the exception. The demurrer, of course, admits this allegation to be true."

We have an identical allegation in the libel (Paragraph IX, page 7 of Transcript).

We respectfully submit, that libelants were entitled to damages for insufficient machinery, and an insufficient number of beachmen. And that the language on the stipulation for damages for failure to take salmon as offered for delivery is binding on appellee. That as the libel stood the exceptions should have been overruled and appellee required to answer. Proof should have been taken on the amount of damage suffered on the first cause of action and appellee held to his stipulation on the second cause of action, and therefore respectfully ask that the decree be reversed.

Dated, San Francisco,
May 10, 1919.

H. W. Hutton,
Proctor for Appellants.

No. 3321

United States

Circuit Court of Appeals

For the Ninth Circuit.

R. L. SABIN, as Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Appellant,

vs.

H. HORENSTEIN,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

FILED
APR 18 1919
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of the Attorneys of Record.

SIDNEY TEISER and L. B. SMITH, Morgan Building, Portland, Oregon, for the Appellant.

M. A. GOLDSTEIN and FREDERICK H. DRAKE, Northwestern Bank Building, Portland, Oregon, for the Appellee.

Citation on Appeal.

United States of America,
District of Oregon,—ss.

To H. Horenstein, GREETING:

Whereas, R. L. Sabin, Trustee in Bankruptcy of the Estate of Louis Judkis, Bankrupt, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 8th day of August, in the year of our Lord, one thousand, nine hundred and eighteen.

CHAS. E. WOLVERTON,
Judge.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 9th day of August, 1918, by receiving a copy thereof duly certified.

F. H. DRAKE,
Of Attorneys for Defendant. [1*]

In the District Court of the United States for the District of Oregon.

March —— Term, 1918.

BE IT REMEMBERED, that on the 1st day of May, 1918, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Complaint.

Comes now R. L. Sabin, trustee in bankruptcy of

*Page-number appearing at foot of page of original certified Transcript of Record.

the Estate of L. Judkis, Bankrupt, and for cause of suit against H. Horenstein, defendant herein, alleges and says:

I.

That on December 10th, 1917, L. Judkis was duly adjudicated bankrupt by the District Court of the United States for the District of Oregon, and that thereafter on December 28th, 1917, R. L. Sabin was elected trustee in bankruptcy of the estate of L. Judkis, Bankrupt, and thereafter duly qualified by filing his bond as such trustee, which bond was duly accepted and approved, and that said R. L. Sabin now is the regularly qualified and acting trustee in bankruptcy of the Estate of L. Judkis, Bankrupt.

II.

That on the 6th day of April, 1918, an order [2] was duly made directing said trustee to enter and maintain this suit.

III.

That by virtue of the laws of the United States made and provided, generally known as the Bankruptcy Act of 1898 as amended, the plaintiff, R. L. Sabin, trustee, is vested with title to and entitled to possession of all of the assets of the said L. Judkis, Bankrupt, for the purpose of administration under the provisions of the said Bankruptcy Act of 1898, as amended, and more particularly is authorized by said Bankruptcy Act to avoid any transfer by the bankrupt of his property which any creditors of such bankrupt might have avoided, and to recover the property so transferred, or its value.

IV.

That numerous claims have been filed by creditors and allowed in said bankruptcy cause, to wit: In the Matter of L. Judkis, Bankrupt, and that sufficient moneys and assets have not been and will not be realized in said estate to pay said creditors in full.

V.

That at various times from July 1st, 1917, to October 31st, 1917, the defendant herein, bargained for and purchased from the said L. Judkis, Bankrupt, quantities of goods, wares and merchandise consisting chiefly of shoes, pants and furnishing goods, in bulk, out of the usual or ordinary course of the business or trade of the said L. Judkis, Bankrupt, and that the said defendant failed to demand and receive from the vendor, the said L. Judkis, before the consummation of any of said purchases and the delivery of the purchase price, or at all, a written, sworn statement containing the names and addresses of the creditors of said vendor, L. Judkis, and the amount of indebtedness due and [3] owing or to become due and owing to each creditor by the said vendor, L. Judkis, and that the said L. Judkis failed to furnish such a statement or statements to said defendant, the purchaser in said transactions. That the defendant herein, as purchaser in said transactions, failed to notify the creditors of said L. Judkis, the vendor, before the consummation of any of said purchases and the delivery of the purchase price, or at all.

VI.

That at the time of said bargainings, purchases

and sales mentioned in Paragraph V hereof, the said L. Judkis, Bankrupt, had numerous creditors to the extent of many thousands of dollars; that the said claims of many of the said creditors of said L. Judkis were unsatisfied at the time of the adjudication in bankruptcy of said L. Judkis, and still are unsatisfied, and that said sales and purchases and transfers in bulk described in Paragraph V hereof were and are, as to the said creditors of said L. Judkis, Bankrupt, fraudulent and void.

VII.

That the value of the goods, wares and merchandise so purchases as aforesaid from the said L. Judkis by the said defendant is in excess of one Thousand ($1,000) Dollars, but as to the amount of said excess, plaintiff is uninformed and because of the nature and manner of the transactions between said defendant and said L. Judkis has not been able to ascertain the same.

WHEREFORE, plaintiff prays that a decree be entered declaring null and void the said sales made by said L. Judkis to the said H. Horenstein of said goods, wares and merchandise, as set forth herein, and determining the value of said goods, wares and merchandise so sold, and directing judgment in the amount so determined, together with interest [4] thereon at the rate of 6% per annum from the date of said sales, and for the costs and disbursements of

this suit and for such other relief as the Court may deem meet and proper.

(Signed) L. B. SMITH and
TEISER & SMITH,
By L. B. SMITH,
Attorneys for Plaintiff.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, R. L. Sabin, being first duly sworn, depose and say: That I am the plaintiff in the above-entitled suit, that the facts contained therein are true, as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 25th day of April, 1918.

[Seal] MARIE BROWNE,
Notary Public for Oregon.

My commission expires March 13, 1921.

[Endorsed]: No. 7860. 25–29. In the District Court of the United States for the District of Oregon. R. L. Sabin, Trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, Plaintiff vs. H. Horenstein, Defendant. Complaint. U. S. District Court, District of Oregon. Filed May 1, 1918. G. H. Marsh, Clerk.

That thereafter, to wit, on the 24th day of May, 1918, there was filed in said court, by defendant, an answer in the following words and figures, to wit:

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant. [5]

Answer—#7860.

Comes now the defendant above named, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows, to wit:

I.

Answering paragraphs I, I, III and IV and VI of plaintiff's complaint, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies each and every allegation, matter, statement and thing therein contained, and the whole thereof.

II.

Answering paragraph V of said complaint, defendant denies that defendant at any time or times from July 1st, 1917, to October 31st, 1917, or at all, purchased from L. Judkis, goods, wares or merchandise in bulk out of the usual or ordinary course of the business or trade of the said L. Judkis, and in

this regard defendant alleges the facts to be that all of the goods, wares and merchandise purchased by the said defendant of the said L. Judkis, were purchased in the usual, customary and ordinary course of the business or trade of the said L. Judkis.

III.

Answering paragraph VII of plaintiff's complaint, defendant denies each and every allegation, matter, statement and thing therein contained, and the whole thereof.

For a further answer and defense, defendant alleges:

I.

That during all of the time from July 1st, 1917, to October 31st, 1917, and for a long time prior thereto, L. Judkis was engaged in and carried on a wholesale and retail mercantile business.

II.

That at various times between July 1st, 1917, and [6] October 31st, 1917, and at various times prior thereto, defendant purchased goods, wares and merchandise of L. Judkis, and that all of the said goods, wares and merchandise purchased by defendant of the said L. Judkis, were purchased in the usual, customary and ordinary course of the business or trade of the said L. Judkis, and were paid for in full.

III.

That the sum of $150 is a reasonable sum to be allowed defendant as attorney fee in defense of this suit.

WHEREFORE, defendant having fully answered the plaintiff's complaint herein, prays that

plaintiff take nothing herein and that defendant have a decree and judgment against plaintiff, for the attorney fees in the sum of $150, and for his costs and disbursements herein incurred.

(Signed) M. A. GOLDSTEIN,
FREDK. H. DRAKE,
Attorneys for Defendant,

State of Oregon,
Multnomah County,—ss.

I, H. Horenstein, being first duly sworn, say: That I am the defendant in the within entitled cause; and that the foregoing answer is true as I verily believe.

(Signed) HERMEN HORENSTEIN.

Subscribed and sworn to before me this 23d day of May, 1918.

[Seal]

(Signed) FREDERICK H. DRAKE,
Notary Public for Oregon.

My commission expires Mar. 26th, 1921.

Due service of copy of within Answer admitted at Portland, Oregon, May 23, 1918.

(Signed) TEISER & SMITH,
By SIDNEY TEISER,
Attorneys for Plaintiff. [7]

[Endorsed]: No. 7860. 25–29. In the District Court of the United States, District of Oregon. R. L. Sabin, Trustee in Bankruptcy for the Estate of L. Judkis, Bankrupt, Plaintiff, vs. H. Horenstein, Defendant. Answer. U. S. District Court, District of Oregon. Filed May 24, 1918. G. H.

Marsh, Clerk. Frederick H. Drake, Morris A. Goldstein, 801 Northwestern Bank Building, Portland, Oregon, Attorneys for Defendant.

And be it further remembered, that after hearing testimony in said cause, the Court handed down the following opinion, to wit:

Opinion of the Court.

WOLVERTON, District Judge.

This is an action by R. L. Sabin, Trustee in Bankruptcy of the Estate of L. Judkis, plaintiff, against H. Horenstein, defendant. The action is based upon the statute which is designed to prohibit the sale of merchandise stocks in bulk. The statute itself provides that it shall be the duty of every person who shall bargain for, or purchase goods in bulk to require of the vendor a statement of the goods, containing the purchase price, and this statement is to be under oath. Then it devolves upon the purchaser to notify the creditors of the vendor of the proposed sale, in order that the creditors may be [8] warned or advised of what is going to take place, so that if necessary they can protect themselves.

The term "sales in bulk" is defined by Section 6072, and, so far as it applies to this case, the definition is this:

> "Any sale or transfer of goods, wares or merchandise, * * * out of the usual or ordinary course of the business or trade of the ven-

> dor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons."

It seems to me that the spirit of this statute is to prevent persons who are dealing in merchandise from disposing of their entire stock, or of the larger proportion of it, or of such a proportion of it as will render the vendor less able to pay his obligations. I do not think it applies to small sales in bulk, or to sales that do not materially affect the vendor's solvency, if I may put it in that way. That interpretation of the statute appears from the statute itself in reading further as to the definition of sales in bulk. The statute says: "Any sale or transfer of goods, wares or merchandise, or all or substantially all of the fixtures or equipment used, or to be used in the sale, display, manufacture, care or delivery of said goods," etc., and then it says, "out of the usual or ordinary course of the business or trade of the vendor, or whenever thereby substantially the entire business or trade" is to be disposed of.

So that sale in bulk must be read with reference to each particular business, and it must be such a sale as will indicate that the vendor is intending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solvency, and render him unable to pay his debts in the usual course.

I will say further that, where a sale in bulk is made within the provisions of the statute, that sale

is [9] conclusively presumed fraudulent and void. So, therefore, where a sale in bulk is made I presume suit will lie to recover back the goods that have been purchased, where the vendee is aware of the conditions under which he is purchasing.

In this case, the attempt is not to recover back the goods, but to recover the value of the goods which the vendee has purchased. I presume that may be resorted to where the vendee has parted with the goods that he has purchased.

Now, in the present case Judkis was doing business for himself for several years—I think from 1914—and he says that he was doing both a retail and jobbing business. That is his testimony, or the effect of it.

It has been shown that he has on numerous occasions sold goods in jobbing lots. Some eight or ten witnesses have appeared upon the stand here who testify that they have so purchased from him. These purchases have extended back for some period. The bulk of the purchases were made, I think, within the last three or four months of the time in which Judkis was in business; but it is evidence of the fact of the manner of his doing business. These individuals who testified to their purchases in jobbing lots have not only testified that they have purchased in one lot, but they have purchased more than one lot. They have made purchases from time to time as high as eight or ten or more. Take the defendant in this case. He testifies that he purchased from time to time different job lots of Judkis, and he has brought here as testimony of the fact the checks that he has

issued in payment of the goods. Mr. Solomon was called as a witness here, and he also produced checks showing that he had half a dozen or more transactions with Judkis in which he made purchases in job lots, and these checks are evidence of that fact. So it is with other witnesses. When we put this testimony all together, we find that there are numerous instances in which purchases have been made in job lots. This is evidentiary of the fact which the defendant claims, that Judkis was doing a **[10]** jobbing business as well as a retail business.

It is said that this testimony is not reliable, but that cannot affect this case very materially, because there is no evidence, practically, to the contrary, and the Court must rely upon this testimony for its decision, or this kind of testimony.

I will say in passing that I have read the testimony in the bankruptcy matter, which has come up for review from the Referee in Bankruptcy, of Mr. Judkis, and there is no doubt in my mind but what Mr. Judkis was doing a fraudulent business; that is to say, he was attempting to defraud his creditors; and there are indications, taking into account the testimony of the witnesses who have purchased from Judkis, from which inferences may be drawn, that there were others in his design to defraud as well as himself, and that it was rather a combination than the act of one person. It looks that way to me. And if the combination could be ferreted out, it might be that others might be made responsible as well as Judkis for these transactions. But upon the whole, the Court cannot say but what Judkis, as he claims, and as the de-

fendant claims, was doing, not only a retail business, but a jobbing business at the same time, although in an irregular way. These people down there are seemingly out of touch with the regular way of doing business by the regular merchants; but the unusual way, by persistence in it, may become the usual way. So in this case, Judkis, in selling in job lots, was selling in the usual way according to his own business transactions and his own business methods.

I can see no other conclusion under the testimony in this case, and the complaint will be dismissed. [11]

And afterwards, to wit, on Thursday, the 18th day of July, 1918, the same being the 16th judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [12]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy, of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Decree—No. 7860.

This cause having come on regularly for hearing upon the pleadings of the respective parties and the

testimony adduced by the said parties before the Court, and the said cause having been argued by counsel and submitted to the Court for its decision, and the said cause having been fully considered:

IT IS ORDERED, ADJUDGED AND DECREED, that the complaint of the plaintiff be, and the same is hereby dismissed, and that the defendant have and recover of and from plaintiff, his costs and disbursements herein, taxed at $50.95.

Done in open court this 18th day of July, 1918.

(Signed) CHAS. E. WOLVERTON,
U. S. District Judge.

[Endorsed]: #7860, 25–29. In the District Court of the United States for the District of Oregon. R. L. Sabin, Trustee in Bankruptcy of the estate of L. Judkis, Bankrupt, Plaintiff, vs. H. Horenstein, Defendant. U. S. District Court, District of Oregon. Filed Jul. 18, 1918. G. H. Marsh, Clerk. Frederick H. Drake, and Morris A. Goldstein, 802 Northwestern Bank Building, Portland, Oregon, Attorneys for Defendant. [13]

That afterwards, to wit, on the 8th day of August, 1918, there was duly filed in said court a petition for appeal and order of allowance, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy, of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Petition for Appeal—No. 7860.

The above-named plaintiff, R. L. Sabin, Trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, conceiving himself aggrieved by the decree herein made and entered on the 18th day of July, 1918, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit.

(Signed) TEISER & SMITH,
By SIDNEY TEISER,
Attorneys for Plaintiff.

Dated Aug. 8, 1918. [14]

Order of Allowance.

The foregoing appeal as prayed for is allowed.

(Signed) CHAS. E. WOLVERTON,
District Judge.

Dated Aug. 8, 1918.

United States of America,
Dist. and State of Oregon,
County of Multnomah,—ss.

Due service of the within Petition for Appeal is hereby accepted in Multnomah County, Oregon, this 6th day of August, 1918, by receiving a copy thereof duly certified to as such by Sidney Teiser, Attorney for Plaintiff.

(Signed) F. H. DRAKE,
Attorney for Defendant.

[Endorsed]: No. 7860. 25–29. In the District Court of the United States for the District of Oregon. R. L. Sabin, Trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, Plaintiff, vs. H. Horenstein, Defendant. Petition for Appeal. U. S. District Court, District of Oregon. Filed Aug. 8, 1918. G. H. Marsh, Clerk.

That afterwards, to wit, on the 8th day of August, 1918, there was filed in said court an assignment of errors, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Assignment of Errors. [15]

Comes now plaintiff, R. L. Sabin, Trustee in Bankruptcy of the estate of L. Judkis, Bankrupt, by Teiser & Smith, his attorneys, and says: That the decree entered in said cause on the 18th day of July, 1918, is erroneous and against the just rights of said plaintiff for the following reasons:

FIRST. Because the evidence showed that the sale of merchandise made by the bankrupt, L. Judkis, to the defendant, H. Horenstein, was out of the usual course of business of said L. Judkis, and the requirements of the statutes of Oregon, when such sales are made out of the usual course of business, had not been complied with.

SECOND. Because the evidence showed that the course of dealings between L. Judkis, vendor, and H. Horenstein, vendee, was out of the usual, and was fraudulent in the absence of compliance with the statutes of the State of Oregon, Sections 6069, 6070, 6071, 6072, Lord's Oregon Laws, as amended.

THIRD. Because the evidence showed that L. Judkis was a retail merchant, and as such, the sales shown in the evidence to H. Horenstein were out of the usual and ordinary course of business or trade, and that the statutes of Oregon, Lord's Oregon Laws, Sections 6069 and 6070 had not been complied with.

FOURTH. Because the Court erred in holding that the transactions prohibited by the statutes of Oregon, Section 6072, were of sales made in bulk and not sales made out of the ordinary course of business or trade of the vendor.

FIFTH. Because the Court erred in holding that the sales, as shown by the evidence, made by L. Judkis to H. Horenstein, were not out of the usual and ordinary course of business or trade of the vendor.

SIXTH. Because the Court erred in holding that [16] the course of business, actually and in fact, conducted by the vendor was a standard in determining what was the usual and ordinary course of business of the vendor.

SEVENTH. Because the Court erred in dismissing the Complaint.

WHEREFORE, the said plaintiff prays that said decree be reversed, and that said Court may be directed to enter decree in accordance with the prayer of plaintiff containd in his Complaint.

(Signed) TEISER & SMITH,
By SIDNEY TEISER,
Attorneys for Plaintiff.

United States of America,
Dist. and State of Oregon,
County of Multnomah,—ss.

Due service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 6th day of August, 1918, by receiving a copy thereof duly certified to as such by Sidney Teiser, of Attorneys for Plaintiff.

(Signed) F. H. DRAKE,
Attorney for ———.

[Endorsed]: No. 7860. 25–29. In the District Court of the United States for the District of Oregon. R. L. Sabin, Trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, Plaintiff, vs. H. Horen-

stein, Defendant. Assignment of Errors. U. S. District Court, District of Oregon. Filed Aug. 8, 1918. G. H. Marsh, Clerk. [17]

And afterwards, to wit, on the 5th day of March, 1919, there was duly filed in said court a statement of the evidence in words and figures as follows, to wit: [18]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Narrative Statement of Evidence.

Statement of the evidence to be included in the record in simple, condensed form, all parts not essential to the decision of the question presented by appeal being omitted, and the testimony of witnesses being stated only in narrative form, said statement of evidence being prepared by the appellant.

EVIDENCE ON BEHALF OF PLAINTIFF.

Testimony of R. L. Sabin, for Plaintiff.

R. L. SABIN.

R. L. SABIN, the duly elected, regularly qualified and acting trustee in bankruptcy in the above-entitled matter, called as a witness on behalf of the plaintiff,

(Testimony of R. L. Sabin.)
testified that he was trustee of the estate of L. Judkis, bankrupt, and that the assets of the estate will not be sufficient to pay in full creditors whose claims had been filed and allowed.

Testimony of L. Judkis, for Plaintiff.

L. JUDKIS.

L. JUDKIS, the bankrupt, was called as a witness on behalf of plaintiff, and upon direct examination testified that he sold merchandise in bulk to H. Horenstein, the defendant, during the months of July, August and September, 1917, and that [19] Judkis used very often to borrow $200, $300 or $400 at a time from Horenstein, the defendant, and upon one occasion when he asked Horenstein to lend him more money, Horenstein told him that he did not have any more money that he could let him have, so Horenstein was told by Judkis that he would then sell him some merchandise whereby Horenstein could make 5¢ or 10¢, say, on a pair of shoes, and at the same time accommodate him by letting him have a few hundred dollars, and that was the way he sold it, and that during the months of July, August and September about $1,000 worth of merchandise was sold to Horenstein in lots of about $200, $250 and maybe $300 at a time, the object in thus selling the goods being in order to get money to settle bills, since not much was sold in the store and Judkis found that he could not borrow money to pay the debts that he owed—so he sold it. Horenstein was not told by Judkis what the money was desired for and Judkis did not furnish

(Testimony of L. Judkis.)

to Mr. Horenstein a list of his creditors, nor did Horenstein ask for it. The witness further testified that he had, some five years previously, been in business with one Jacob Bromberg, from seven to nine months, and that during the partnership goods were purchased and sold in job lots. About 1914 the partnership was dissolved and Judkis went into business for himself, which he conducted under the name of American Clothing Company until the time of bankruptcy. The business conducted by him after the partnership venture was that of selling goods at retail, but a little jobbing was done, that is, selling goods in bulk. Thereupon the following questions were asked and the following answers given:

Q. Now, what was the kind of business that was conducted by the American Clothing Company, by you doing business as the American Clothing Company?

A. I been selling retail—retail, and a little doing jobbing.

Q. You were selling at retail? [20]

A. Retail, most at retail, and a little jobbing.

Q. What do you mean by jobbing—wholesale?

A. Yes, selling in bulk at little at a time.

Q. What do you mean, Mr. Judkis, by selling in bulk?

* * * * * * * * *

Q. Mr. Teiser asked you if you had sold goods in bulk to Mr. Horenstein? A. Yes, sir.

Q. Now, what do you understand by the term "bulk," selling in bulk?

(Testimony of L. Judkis.)

A. That means selling wholesale.

Q. By that you mean that you sell wholesale?

A. Yes.

Q. Did you sell any goods or merchandise to Mr. Horenstein out of your usual or ordinary course of business?

A. I never had a thought of that, if it is usual, or not. I used to sell all the time, so I sold him. I never thought whether it was usual or not usual. I used to do it. I don't know whether you call it usual or not usual. I used to do it all the time.

Q. The goods you sold to Mr. Horenstein, was there anything unusual about it, or was that the way you had been doing business?

A. The way I had been doing business.

Q. Now, Mr. Judkis, you said that you sold something like $1,000 worth of goods to Mr. Horenstein?

A. Yes.

That during the times he was in business he sold goods in bulk to lots of people besides Horenstein. Whereupon the following questions were asked and the following answers given:

Q. Now, Mr. Judkis, to whom else did you sell, as you term it, sell goods in bulk during the time that you were in business?

A. Sell to lots of people.

Q. Can you give us the names of some of them?

A. Sold to Mr. J. Soloman.

Q. You sold to J. Soloman? A. Yes.

Q And those goods were sold to Mr. Soloman the same way that they were sold to Mr. Horenstein?

(Testimony of L. Judkis.)

A. Yes, sir. [21]

Q. Whom else did you sell to?

A. Sold to Meyer Wax.

Q. Anybody else?

A. Yes. Sold to Krause—L. Krause, H. Cohen.

Q. Did you sell any goods the same way to Mr. Schwartz?

A. Yes, I sold to him, some of it.

Q. To a man by the name of Bloom?

A. I have sold Bloom only once about $15 or $18 worth of merchandise; that is all; never did any more.

Q. Do you recall selling any to Mr. Richter?

A. About five or six or eight dollars, something like that. That is all I have sold him.

Q. Mr. Glickman?

A. Glickman I have sold some a long time ago, some ladies' goods. I closed him out a line of ladies' goods. I used to have ladies' goods. I sold them out.

Mr. TEISER.—Is that while you were doing business as the American Clothing Company?

A. American Clothing Company.

COURT.—I don't suppose you want to inquire about the matters he sold at retail?

Mr. DRAKE.—No, I am asking him those he sold to similar to the transactions he sold to Mr. Horenstein.

COURT.—Well, four or five dollars isn't that kind of sale.

Mr. DRAKE.—I only thought of calling off these

(Testimony of L. Judkis.)

names it would expedite matters. I can simply let him think out the names. I thought possibly it would expedite the matter by calling off the names to him. I have taken a lot of these names from the testimony as submitted before the referee.

COURT.—I have read the testimony recently. There are certain sales that he made there to individuals of considerable amount. Those sales were at cost price, practically; but he did sell during the same time a considerable amount of goods at retail.

Mr. DRAKE.—Yes, sir.

COURT.—It seems to me that we have nothing to do with those retail matters in this case, as I understand it.

Mr. DRAKE.—No, I am trying to eliminate. The sales I am referring to are to show that he was in wholesale as well as the retail business. I am simply asking him the names of the parties to whom he sold at wholesale.

COURT.—Very well, go ahead. [22]

Q. How about W. Simon?

A. I sold Simon some.

Mr. TEISER.—How much?

A. $30, $40 at a time; $50 sometimes.

Q. How much altogether?

A. I don't know. It would be about a few hundred dollars altogether.

Q. How about a man by the name of Bromberger?

A. I sold him $150.

Q. Robinson?

(Testimony of L. Judkis.)

A. Robinson, I have sold something about a couple of hundred dollars. He used to buy from me all the time. I don't know how much it was altogether.

Q. Buy at wholesale? A. Yes.

Q. Did you also sell at wholesale to a man up in Oregon City—I have forgotten his name?

A. Yes, he used to come around. He didn't buy much. He used to buy $20 at a time—$15—$30 at a time.

Q. It was wholesale? A. Yes.

Q. Do you remember his name?

A. I don't know—I think his name is Goodman or Goodwin.

Q. Is there anybody else you sold to at wholesale?

A. A fellow by the name of Wilnitsky, also a small amount.

Q. Wilnitsky? A. Yes.

Q. Anybody else?

A. I don't remember anybody else.

Q. How much did you sell to A. Bernstein?

A. About $400 or $500, something like that.

Q. At wholesale? A. Yes.

Q. Do you remember how much you sold to L. Krause? A. I don't remember now.

Q. Can you tell approximately?

A. Something about $900 or $1,000; something like about $1,000.

COURT.—You never kept any books?

A. No, sir. [23]

Q. Now, when did you first start in to sell goods at wholesale?

(Testimony of L. Judkis.)

A. When I started in in business.

Q. Right from the very start? A. Yes.

Q. And you conducted then both a wholesale and retail business?

A. I sold at wholesale, but I didn't call myself a wholesaler.

Q. In connection with your business, you had a warehouse, didn't you, Mr. Judkis?

A. Not all the times.

Q. How long did you have the warehouse?

A. I had it last year about two or three months, and then another year about two or three months—three months.

Q. Two or three months of 1916?

A. 1916; and about three months 1917,—something like that—or four months; I can't tell.

Q. Did you sell anything at wholesale to a man by the name of Schwerdlick?

A. Yes, sir; that is a long time ago. I have sold him about $215, something like that, a long time ago.

Q. Now, what was the largest amount you ever sold to Mr. Horenstein at any one time?

A. Between $200 and $300.

Q. What was the smallest amount?

A. The smallest amount, about $6 or $7 sometimes, sold him half a dozen shirts at one time, I remember.

Q. Mr. Horenstein also purchased from you at retail, didn't he?

A. Yes, whenever he needed it he came in and bought it.

(Testimony of L. Judkis.)

Q. Part of the goods he purchased from you between July and October were purchased at retail also? A. Small amount, yes.

Q. And that was included in what you say was $1,000 worth of goods that he purchased of you?

A. I don't remember that.

Q. Mr. Horenstein also at one time bought a stock of merchandise from you that you bought from Mr. Sabin, didn't he? A. Yes, sir.

Q. Didn't you sell a brother-in-law of Schwerdluck some goods at wholesale, a brother-inlaw of Schwerdlick, that tailor? A. No. [24]

Q. Didn't you sell him a bunch of youths' suits?

A. This man called Schwerdlick, that is the only one I have sold. I have sold him once. Same man I sold him three years ago some clothing, about $200, and then I sold him some youths' suits two years or a year and a half ago, the same man.

One of the transactions particularly recalled as between Horenstein and the witness was that of a lot of shoes, which Horenstein purchased for $225, and which Judkis purchased on credit for $225 from the Mason Shoe Company, one of his creditors, and for which he did not pay. These shoes were sold from the shelf of the retail store to Horenstein at invoice cost, less freight. During the latter period Judkis rented a storeroom near his retail store, in which he received goods. The windows of the storeroom were pasted over with paper so as to keep anyone from looking in, but no goods were sold from this storeroom, the reason for having this store-

(Testimony of L. Judkis.)

room or warehouse being, according to the witness, that his store was infested with rats and the goods were placed in the storeroom or warehouse so as to prevent rats from getting into them. Mr. Horenstein had paid him for everything he purchased.

Testimony of Jacob H. Ballin, for Plaintiff.

JACOB H. BALLIN.

JACOB H. BALLIN, being called was a witness on behalf of plaintiff, testified in effect as follows: That he was a salesman employed by Neustadter Bros., wholesale men's furnishing goods, and that he had been employed in similar business in various capacities for some thirty-one years, and that he knew L. Judkis, and was familiar with the business and store conducted by L. Judkis on First Street in Portland, Oregon, which was the business so conducted by Judkis at the time of bankruptcy; that he visited L. Judkis at his store as city salesman on various occasions, and frequently sold him goods; that he was competent to state, from observation, the character of business conducted by Judkis. Thereupon the following [25] questions were asked and the following answers given:

Q. What business was Mr. L. Judkis engaged in?

A. In the retail gents' furnishing and clothing line.

Q. Now, there has been testified to, here, Mr. Ballin, that Mr. Judkis sold to Mr. Horenstein merchandise during July, August and September in amounts as high as $300, and as low as $50, I think,

(Testimony of Jacob H. Ballin.)

from time to time, aggregating in all $1,000, during those three months or more, one of which typical transactions I understand is a sale of some 36 pairs of shoes at one time, which shoes, it is testified here, were sold at cost, without freight added, at inventory cost. What would you say as to the sale of those goods to Mr. Horenstein, under the circumstances I have mentioned, as to whether they were in the usual and ordinary course of business of L. Judkis.

A. They were not—

COURT.—Just let me ask a question. Would a sale to a person of that amount in retail business be an ordinary sale? A. It would not.

Q. Would that amount of sales, Mr. Ballin, with a man doing a wholesale business, would that be in the usual and ordinary course?

A. It certainly would.

Q. Did you ever purchase any goods from Mr. Judkis, Mr. Ballin? A. I did not.

Q. Do you know of your own knowledge whether or not he sold goods at wholesale?

A. I didn't know that he was selling goods at wholesale at any time.

Q. Did you ever see anybody buy any—did you ever see Mr. Judkis make any sales?

A. I have seen him make sales over the counter at retail?

Q. How often?

A. Why, that I couldn't say. Possibly every time I went in there. As a rule, a customer came.

(Testimony of Jacob H. Ballin.)

Q. Now, Mr. Ballin, isn't it a fact that Mr. Judkis also had some women's clothing there? You said he was a gents'—

A. I don't remember any women's clothing at all.

Q. You were not sufficiently familiar with his stock to know whether he had any. That is all.

Mr. TEISER.—That is all, Mr. Ballin. **[26]**

Testimony of Anselm Boscowitz, for Plaintiff.

ANSELM BOSCOWITZ.

ANSELM BOSCOWITZ, being called as a witness, in behalf of plaintiff, testified as follows: That he was city salesman for Fleischner, Mayer & Company of Portland, Oregon; that as such a salesman he sold Judkis goods and was familiar with the store and business done by Mr. Judkis; that he has been engaged in the business of city salesman since the fall of 1904 until the present time, and that Judkis was doing a retail business and not a wholesale business. Whereupon the following questions were asked and the following answers given:

Q. What business was he doing, what kind of business, in regard to wholesale or retail business?

A. Retail business.

Q. Now, Mr. Boscowitz, what would you say where one was conducting a retail business, such as Mr. Judkis was, and in that business he sold merchandise to one man aggregating some $1,000, during three months time, one of which sales was for $225, and other sales being in as much as that at one time, and some of them being as low as $50, but aggregat-

(Testimony of Anselm Boscowitz.)

ing in all during the three months' time some $1,000 or more, being sold in bulk, and in the case mentioned of the shoes, the money paid for those shoes being the actual invoice price without freight, price paid by the buyer, what would you say under those circumstances, of such a retailer, selling as set forth, as to whether the sales as I have mentioned of $1,000, etc., aggregating $1,000, was in the ordinary course of business?

A. I would state in the matter of the shoe transaction, you put the example before me, providing the jobber or manufacturer didn't give the retailer consent to dispose of the shoes, it would be an unusual transaction.

Q. What would all these transactions be as to whether they were usual or unusual? Would the transaction of a retail merchant, such as I have expressed it, selling goods in bulk such as I have mentioned to you be usual or unusual, or in the usual course of business, or not in the usual course of business?

A. It is not usual for a retailer to sell in that manner.

Q. Did you purchase any goods from Mr. Judkis at all?

A. Mr. Judkis on First Street, I don't remember of purchasing any goods. Possibly when he was in partnership with Mr. Bromberg on Washington Street, I might have purchased something, I don't remember. [27]

Q. Now, the sales detailed by Mr. Teiser in this

(Testimony of Anselm Boscowitz.)

hypothetical question, would that be anything unusual if a man was in the wholesale or jobbing business?

A. Providing the merchandise was—providing he made a profit on the merchandise, the transaction would be satisfactory in a jobbing sense; or if the merchandise was out of date or anything like that, it would be all right to sell it for less.

Q. Isn't it a fact if a merchant gets odd sizes, or stock he cannot handle, or if there is old stock on his hands, that those things are disposed of in job lots?

A. Old stock on his hands, he will dispose of at times.

Q. Is it anything unusual for a wholesale merchant to sell goods as the goods were sold to Mr. Horenstein by Mr. Judkis, say covering a period of four months, that would aggregate in the neighborhood of $1,000?

A. It wouldn't be unusual if there was a profit shown, or if the goods were as a retail merchant generally sells goods that are not suitable for his stock; not stuff that really he has ordered and he needs in his stock.

Q. Eliminating the question of profit, if a man went in there to purchase a dozen or two dozen pair of shoes, a man assuming that he was in the wholesale business, a man goes in there, the merchant puts a price upon those shoes, the customer buys them. Is that right? Is there anything unusual about that, buying the quantity that he did, a man in the wholesale business?

(Testimony of Anselm Boscowitz.)

A. In the wholesale business?

Q. Yes. A. No.

Q. Were you aware of the fact that Mr. Judkis was selling at wholesale to a dozen or more people in the city?

A. No, I was not aware of it.

Q. You were not aware of that fact? A. No.

Q. You don't know whether he was or not, do you?

A. I am quite sure he was not, to my knowledge, selling to a dozen or more people. I was not aware of that fact.

Q. Well, I am simply saying, or asking the question whether or not of your own personal knowledge you knew that he was selling at wholesale to a dozen or more people in the city of Portland?

A. Not a dozen people, no.

Q. You didn't know anything about that? Your opinion of the business that he was conducting was based entirely upon the assumption that he was only selling at retail? A. Yes.

Q. How were his premises fitted out, Mr. Boscowitz?

A. For a retail establishment. [28]

Q. Did he have any facilities, so far as you saw, for a jobbing business, doing a wholesale business; that is, on his premises?

A. In his room in the rear of the store, was partitioned off the store, there was a small space that he could have used.

Q. Well, was he using it for such, so far as you

could see, the rear of his store?

A. I saw some large quantities of merchandise there at times, which he could have jobbed off, and he told me he did job off.

COURT.—What about the jobbing business? Did you hear that he was doing a jobbing business?

A. I did not.

Q. Did you not testify a moment ago that you heard that Mr. Judkis was doing a jobbing business?

A. The question the Judge put to me, did I hear that he was doing a jobbing business.

Q. Well, didn't Mr. Judkis tell you that he was doing a jobbing business? Didn't you so testify?

A. Mr. Judkis, as I understand about his jobbing business, is, when he would have surplus quantities he would sell it.

COURT.—In job lots?

A. Yes. All I know of his jobbing business is some underwear that he sold to Mr. Wax, some cotton underwear. That is the only transaction I can recall.

Q. You were aware then that he was jobbing some of his goods?

A. Just this one article, as I remember it, and some Buster Brown hosiery that he told me about.

Testimony of James A. Bamford, for Plaintiff.

JAMES A. BAMFORD.

JAMES A. BAMFORD, being sworn as a witness, testified on behalf of plaintiff as follows: That he was city salesman for the Goodyear Rubber Com-

(Testimony of James A. Bamford.)

pany, and had been thus engaged for a period of seventeen years in Portland, Oregon, and that he was familiar with the retail trade generally and knew of the business and store formerly conducted by L. Judkis at #251 First Street, Portland, Oregon, and that he had been selling Judkis for three years; that the business conducted by Judkis at that place was that of a retail store, so far as his [29] knowledge was concerned. Whereupon the following questions were asked, to which witness answered:

Q. Now, what would you say as regards the usual or unusual course of business of one who was doing a retail business, such as Mr. Judkis, and was selling goods to a particular individual, aggregating some $1,000 worth within three months. From time to time in lots aggregating an amount from $300, say, to $50 each time, one of which lots amounted to about $225, and consisted of a sale of shoes, which was bought at the very same price it was sold by the retailer, and he bearing the loss of the freight, what would you say to such a sale as to its usual or unusual character by one conducting a retail business such as Mr. Judkis?

A. I would say it was unusual and unbusinesslike.

Q. Was it in the usual course, usual and regular course of business of one so conducting a store?

A. He could not stay in business and do that. He would have to cover overhead.

Q. Was it then in the usual or unusual course of business? A. Unusual.

(Testimony of James A. Bamford.)

Q. Did you know of your own knowledge whether or not Mr. Judkis was conducting a wholesale business in connection with the retail business?

A. Never heard of him wholesaling. He had a retail establishment.

Q. You didn't know whether he conducted a wholesale business?

A. I never knew of him wholesaling goods.

Q. Can you state of your own personal knowledge whether or not he conducted a wholesale business in connection with it?

A. I can only say that his place was equipped as a retail store. I have seen him retail goods, and I have never seen any jobbing done there.

Q. Now, eliminating the question of profit on those goods, whether there was a profit made on the goods or not, if a man was in the wholesale or jobbing business, was the selling of 36 pairs of shoes anything unusual or out of the ordinary course of business of a wholesaler or jobber?

A. In selling that quantity, a jobber.

Q. Yes, selling that quantity of shoes.

A. No, it would not be unusual for a jobber.

Q. Supposing the merchandise shipped did not come up to sample, now, rather than send all those goods back and pay freight, wasn't it just as advisable to sell those goods and eliminate the freight?

A. I have known a number of instances like that, in which the matter was referred back to the factory, and the factory [30] made an allowance on the goods.

(Testimony of Winthrop Hammond.)

Q. Do you know whether or not there was any allowance made by the factory in this case?

A. I do not.

Testimony of Winthrop Hammond, for Plaintiff.

WINTHROP HAMMOND.

WINTHROP HAMMOND, a witness being called on behalf of plaintiff, testified in effect as follows: That he is president of Buffum & Pendleton, hat and furnishing goods business at Portland, Oregon; that he had been in such and like mercantile business since he was seventeen years of age almost continuously with the exception of some five years, having owned four large stores in Massachusetts and two stores, besides the present one, in the Northwest; that he was called to take charge of Buffum & Pendleton's business because of business difficulties it was having and for the purpose of reorganizing it, and that he is considered, in the business world, as an expert on merchandise lines, and because of that situation he was called to take charge of the business of Buffum & Pendleton, at Portland. Upon being shown a list, introduced in evidence, of all the creditors of L. Judkis, showing the respective amounts due by L. Judkis to said creditors, he stated that he was familiar with many of the creditor houses, and from that fact and the size of the accounts that it would indicate that the debtor was doing an ordinary retail business, and was certainly not in the wholesale business, and that a person owing said accounts and no others was certainly in

(Testimony of Winthrop Hammond.)
the retail business, and that transactions such as those between Horenstein and Judkis were somewhat unusual in a retail business, and were very unusual, especially if the sales were for cash. Whereupon the following questions were asked and the following answers given: [31]

Q. Now, let me ask you whether a merchant who was doing a retail business, having a stock of say $10,000 to $12,000, if he sold during the period of three or four months merchandise aggregating about $6,000, to about seven or eight men in amounts of from $50 to $300 at a time; in one case, $1,000 worth of goods being bought by one man in three months, in amounts from $50 say to $300 at a time, and practically the same situation as to the other people—one man buiying $1,500 or $1,000 worth, another buying $1,000, another buying $1,000 and another buying $500 or so—whether that man so selling those goods was selling in the usual course of his business?

A. I should say those transactions would be somewhat unusual in a retail business, yes, sir.

Witness further testified that he knew of no wholesale or jobbing houses in the West selling only for cash; that he had no personal knowledge of Judkis, and never heard of him or of his business, but that he was speaking from general conditions, and that if a merchant had a string of liabilities running from $50 to $300 or $400 or $500, such as Judkis had, he was not conducting a wholesale business, and that the firms to whom Judkis owed money did not

(Testimony of Winthrop Hammond.)

sell to wholesalers or jobbers, but that they sell only to the retail trade, and that all the creditor houses whom Judkis owed sell directly to the retail trade, and not to wholesalers or jobbers. That he knew nothing about the nature of the business conducted by J. Solomon, Mr. Glickman, or Mr. Krause, and never had any dealings with them. That he knew nothing about the nature of business involved in this case. That the purchasing of $1,000 worth of goods in 3 months of a wholesale business was certainly not unusual. That he concluded from the list of creditors introduced in evidence that Judkis was not doing a wholesale business because the amounts were comparatively small and accounts so scattered. That it might be possible for a man to carry on a small wholesale business in connection with retail, but he didn't know of any small wholesalers. That they consider a wholesale business a business that had more or less manufacturing connected with it, and the jobbing business may be partially manufacturing or it may be simply a middleman. That from the few names he was familiar [32] with appearing on the list he would say that the list did not contain the names of firms that sell to wholesalers. That he was familiar with a dozen names on the list who sell to retail trade, and didn't think they sold to wholesalers, but was not familiar with the rest. That he didn't know, of his own knowledge, whether they sold to wholesalers or not, but to the best of his knowledge and belief they sold exclusively to retailers.

Testimony of H. Horenstein, for Plaintiff.

H. HORENSTEIN.

H. HORENSTEIN, upon being called as a witness on behalf of plaintiff, testified that he did not give notice to creditors of the purchase of the goods in question from Judkis, nor did he demand from Judkis a list of creditors, sworn to, nor did Judkis give to him such or any list of his creditors.

PLAINTIFF'S EXHIBITS.

There was introduced in evidence certain exhibits, namely, certified copies of the order of adjudication, showing in substance the adjudication in bankruptcy of L. Judkis, bond of trustee and the approval thereof, order directing institution of suit, proofs of claim in bankruptcy, and claim sheet of the referee in bankruptcy, which claim sheet of said referee in bankruptcy was in the following words and figures, to wit:

United States District Court, District of Oregon.

No. 4561.

In the Matter of LOUIS JUDKIS,

Bankrupt.

LIST OF CLAIMS FILED AND ALLOWED.

'ec. 28.	1	Gantner & Mattern Co.	Jos. Kirk or S. Teiser	$105.39
	2	Everwear Manufacturing Co.	" "	153.00
	3	Eleosser Heynemann Co.	" "	147.47
	4	Standard Glove Co.	" "	174.50
	5	Carson Glove Co.	" "	95.00
	6	A. Shirek & Sons, Ltd.	" "	304.10
	7	Louis Straus	" "	192.50

[33]

Date	No.	Claimant	Address / Agent	Amount
	8	Goodyear Rubber Co.	R. L. Sabin or S. Teiser	18.95
	9	The Black Mfg. Co.	" "	404.45
	10	Henry Pickard Co.	" "	149.00
	11	J. & B. Cohen Co.	" "	689.50
	12	Superior Garment Co.	" "	202.73
	13	Western Dry Goods Co.	" "	357.00
	14	Cohen & Casner	" "	279.00
	15	Neustadter Bros.	" "	160.50
	16	True-Fit Waterproof Co.	" "	144.00
	17	The Huiskamp Bros. Co.	" "	334.32
	18	Levy & Co.	" "	161.00
	19	Portland Gas & Coke Co., F. L. Nagel	" "	16.00
	20	Phillips-Jones Company, Inc.	" "	333.25
	21	Montgomery Clothing Co.	Beach, Simon & Nelson	268.05
	22	Ellsworth & Thayer	"	185.00
	23	R. W. Rountree & Bro.	"	102.80
	24	The Snellenburg Clothing Co.	"	383.00
	25	The Star Clothing Mfg. Co.	Ralph A. Coan	250.50
	26	Victor Shoe Co.	"	186.35
	27	L. W. Shoe Co.	"	241.50
	28	J. E. Dayton Co.	"	627.85
	29	Union Special Overall Co.	"	229.50
	30	Freezer & Cohen	"	201.50
	31	Varsity Underwear Co.	"	44.94
	32	Monarch Mfg. Co.	"	150.00
	33	Matchless Shoe Co.	"	248.50
	34	Mishawaka Woolen Mfg. Co.	Mishawaka, Ind.	349.69
	35	Kling Bros. & Co.	Wm. B. Layton or R. A. Coan	249.00
	36	Portland Ry. Lt. & Pr. Co.	H. F. Bushong	2.05
	37	Black Cat Textiles Co.	Kenosha, Wis.	276.00
	38	A. W. Cowne & Bros.	114 East 23rd St., New York	186.88
	39	The United States Nat'l Bank	Portland, Or.	457.45
	40	B. Kirschner & Co.	105 Bleecker St., New York	309.00
	41	West Branch Pants Co.	Williamsport, Pa.	315.60
	42	Green C. Love	Edwin Lindstedt, Platt Bld.	32.50
Jan. 10	43	Bell Bros. & Co.	Dubuque, Iowa	471.00
	44	Pacific Luggage Factory,	c/o Thomas, Beedy & Lanagan San Francisco, Cal.	118.00
	45	Lastufka Bros. & Co.	50 Beal St., San Francisco, Cal.	98.36
	46	The Textile Shirt Co.	4th, Elm & McFarland Sts., Cincinnati, O.	155.25
	47	The American Guaranteed Hole-proof Clothiers Co.	Ralph A. Coan	118.80
	48	Rose Brothers	" "	277.50
	49	Mason Shoe Mfg. Co.	" " Atty. in fact	225.00
	50	Multnomah County, Taxes 1916	PREFERRED	19.73
	51	" " " 1917	"	20.53

L. JUDKIS, Bankrupt.

Claim Sheet—Page 2.

Date	No.	Claimant	Address / Agent	Amount
1918. Feb. 15	52	Smith-Lockwood Mfg. Co.	Teiser & Smith	116.00
	53	N. & S. Weinstein	"	63.75
	54	Felix Rothschild & Co.	D. Solis Cohen	405.00
	55	Swiss-American Knitting Mills	Wm. B. Layton	198.00
	56	Tryon Knitting Mills	Geo. R. Alexander	189.00
	57	A. Lowy	"	58.18
	58	H. & S. Cohn	"	568.50
	59	Theo. Robinson	Russell W. Leary, 200 Broadway, New York City	607.50
Mar. 20	60	The J. G. Leinbach Co., Inc.	R. A. Coan	322.75
	61	The Pacific Telephone & Tel. Co.	Portland	6.70
	62	Louis Kraemer & Co.	Reading, Pa.	262.92
				14,066.81

Evidence on Behalf of Defendant.

There was also introduced in evidence, an advertisement appearing in a German newspaper published in the city of Portland, Oregon, translated as follows:

> "New Spring Boots at greatly reduced prices from $2.25 to $4.00. Work shirts, special 50¢. Complete assortment of furnishings, hats and shoes. Material. We speak German. Real German Service. American Clothing Company, 251 First Street."

The following witnesses were called on behalf of defendant, and testified in substance, as follows, to wit:

Testimony of J. Solomon, for Defendant.

J. SOLOMON.

J. SOLOMON, doing business on First and Morrison Streets, Portland, Oregon, testified that he was engaged in the men's furnishing business at Portland for some twenty-nine years, and that he was acquainted with L. Judkis; was a personal friend of his, knew him about ten or twelve years, and purchased merchandise from him off and on since he was in business for the last three or four years, from $150, $200 to $300 at a time. That he kept no books, but had the canceled checks, which were introduced in evidence. That about October 30th, 1917, he bought seventeen suits of clothes at $10 a suit, which purchase was out of the ordinary course of business. That on October 22d, 1917, he purchased suits in the amount of $89.03; Oct. 11, 1917, merchandise in the

(Testimony of J. Solomon.)
amount of $86.83; September 20th, merchandise in the amount of $177; September 4th, merchandise in the amount of $144, and on September 1st, merchandise in the amount of $55.70. That these goods were bought at wholesale and paid for. That Judkis conducted a wholesale and retail business. Witness testified that when a man gets too much of one article he is willing to sell an amount of it; that he, himself, makes similar sales, sometimes even selling goods for cost and losing [35] the freight; that other stores did likewise and it was customary so to do. He knew that Judkis sold goods to other merchants at wholesale; that the transactions were frequent between Judkis and himself. That when he purchased goods he didn't ask whether the freight had been paid or the goods paid for. Whereupon the following questions were asked and the following answers given:

Q. Was there anything unusual in the transaction between you and Judkis as to the purchase of merchandise for which you have paid these checks?

A. Not any unusual thing. It happened yesterday and day before yesterday in my own store. I am buying from retail and wholesale merchants, and I am selling my own goods whenever I want to get rid of part or a majority of certain lines.

COURT.—Are you doing a jobbing business as well as retail?

A. To-day everybody is jobber. When I have too much of one kind, or odds and ends, I sell it out at cost or below cost. I am not doing exactly a job-

(Testimony of J. Solomon.)
bing business, but when I have got too much of one artiele, I sell it to another dealer.

COURT.—These goods that you bought here, were these goods out of jobbing lots?

A. Not exactly. There is some merchandise I could use. I am going in the market always, and especially now the last two years, on rising market, I go whenever I can—if I can save ten cents on an article, I do it.

Q. You got these goods at cost, didn't you?

A. Only one item I knew I have got at cost, the 17 suits, because I knew what it cost me; I bought goods from the same firm before.

COURT.—You got that goods without freight?

A. I got that goods without freight, that is, one item; but the rest of them I think I paid him profit. I paid him whatever he asked me whenever I could save money.

COURT.—Did you know he got a profit?

A. I think he did.

COURT.—Well, do you know that?

A. Well, I don't think he would sell it without profit.

COURT.—It seems he did in this case.

A. The only actual case I know those 17 suits I bought them from the same house that he did, and I saved the freight. That is all I know about it; but the rest of the articles, I don't.

Q. Mr. Solomon, is it out of the ordinary in a case where Mr. Teiser has just stated Mr. Judkis sold 36 odd pair of shoes to [36] Mr. Horenstein,

(Testimony of J. Solomon.)

and has sold them at cost and lost the freight on them, is there anything unusual about that?

A. Nothing unusual.

Q. Do you know, could you tell what reasons people have, merchants have for doing that?

A. Well, sometimes goods don't come up to sample; sometimes the man has got too much of one article, he orders from different houses, some of the thing he will get rid of, and it will pay him to get rid of, instead of having them on the shelf, to lose the freight on them.

Q. What would you say as to the question where a man has goods that way and he doesn't want to send them back?

A. Well, this is customary, the jobber allows—I mean the manufacturer writes to the house he is willing to lose the freight if he can give him the money or sell them to somebody. The jobber or the manufacturer rather have the man that he send the merchandise to, to lose the freight one way; otherwise he has to pay double freight. When goods don't come up to sample, sometimes there is five or ten per cent difference allowed.

COURT.—All retailers, then, are jobbers?

A. To-day everybody is jobber, and everybody is retailer. I have merchandise to-day, and I have got too much, and a man wants to pay me profit, sell him wholesale. But I heard people giving testimony bulk proposition. Bulk is one thing. Bulk means a man comes in and buys the whole thing. That is different thing. But in the jobbing busi-

(Testimony of J. Solomon.)

ness, a man buys certain article, certain line of shoes, or underwear, or one line of shirts, or shoes, that is jobbing trade. Bulk trade means a man buys the whole store or whole business.

COURT.—The statute defines that.

Q. How big a stock have you, Mr. Solomon?

A. It is worth to-day more than I paid for it, but I have got about $30,000 or $35,000 or $40,000.

Witness further testified that he kept no books other than check-book and inventory book. He takes inventory the first of the year, and gives a statement the first of each month to R. G. Dun and to the United States National Bank, and on the first of the year the income tax. That if a purchase*d* amounted to $2.00 or $3.00 he paid cash. If it amounted to more than that he issued a check. He was not aware that suit was contemplated against him, and knew of no reason why he should be sued. That the suggestion of attorney for plaintiff made in court was the first intimation he had of such a thing. [37]

Testimony of Louis Krause, for Defendant.

LOUIS KRAUSE.

LOUIS KRAUSE, a clothing, gents' furnishings, hat and shoe merchant, doing business at First and Salmon Streets, city of Portland, Oregon, and who had been in such business for about 21 years, carrying a stock varying, according to the season, from $12,000 to $20,000, being called as a witness on behalf of defendant, testified as follows: That he was acquainted with L. Judkis for about two years, and

(Testimony of Louis Krause.)

had some business dealings with him during said time. He had purchased goods from Judkis; that Judkis was doing a jobbing business, and had a retail store in connection therewith. That he purchased some clothing, shoes and underwear from Judkis at wholesale prices for cash in various amount, from about $150 to $200 at a time, aggregating more than $1,000. Witness testified further, as follows:

Q. At the time you would go in to purchase goods, would you inquire whether or not the goods were paid for? Was it customary, or the usual course of business for merchants to inquire whether the goods are paid for, whether the freight had been paid on them or not?

A. Well, that is none of my business. I wouldn't have the cheek to ask a man if he has paid for the goods.

Q. What I am asking is, is it usual and customary, in the ordinary course of business?

A. No, not doing my kind of business. I never asked anybody if he paid for his goods.

Q. You simply go in and ask him his price, and if the price *if* right—

A. Absolutely. If it suits me, I buy it; if not, I leave it alone.

Q. Suppose a man purchased 36 pairs of shoes, would that be an unusual order from a jobber or wholesaler?

A. Why, no. Why, I have got many times right here, from other jobbers, eight and ten and fifteen cases.

(Testimony of Louis Krause.)

Q. Did you buy any cases of goods from Judkis?

A. Well, I think I bought about 24 pair or 22 pair at one time. I think I did, if I ain't mistaken.

Witness further testified that if freight had not been paid upon the goods, but they had been sold for cost, less freight, that [38] would not be unusual, but it is very often done by some merchants when they know they are overstocked when they may use the money for something else. He absolutely did not know that a suit was or might be contemplated against him. The first he knew of it was when the plaintiff's attorney made the statement upon his examination. He had no intimation or thought of such a thing as he bought the goods from a jobber and paid for them. He thought Mr. Horenstein was right, too. He didn't even know Mr. Horenstein and never met him until the day before the trial.

Testimony of Meyer Wax, for Defendant.

MEYER WAX.

MEYER WAX, a witness called on behalf of defendant, testified as follows: That he has lived in the city of Portland, Oregon, for about twenty-two years; was in the general merchandise business for about twenty years at #281 Front Street, corner of Jefferson Street; that he is acquainted with L. Judkis, and has known him about three or four years; had business relations with him for about three years; his nephew used to work for Judkis, and he used to go into the Judkis store and select merchandise; some of the goods were delivered from his

(Testimony of Meyer Wax.)

store and some from his warehouse. When he got in a case of goods Judkis told him he paid so much for it and if he would give him a little profit he would sell it to him; the goods purchased were paid for by witness. He never asked Mr. Judkis whether or not he had paid the freight or whether he paid the bill on any of his purchases, and the goods he purchased of him were bought in the usual and ordinary course of business. Judkis was engaged in the retail business, and partly wholesale; that purchases made from Judkis were in the usual course of business of lots of about $125. He loaned Judkis money, $300 to $500 at a time. He and Judkis were pretty good friends. Bought about $1,000 of goods from him in all during July and August, 1917; paid a little more than cost for them; paid about what witness paid East for goods and saved freight in [39] some lines. Judkis' store was fitted up as a retail store, had counters, etc., just like witness had, but Judkis had a back room, a little place in the back. Witness bought goods from another place. That Judkis is now working for a company in which he, witness, is interested. Whereupon the following questions were asked and the following answers given:

Q. But you bought them over the counter, didn't you? A. Not exactly, not all of it.

Q. You bought them from the shelf? A. No.

Q. You never bought them from the shelf?

A. Very seldom.

Q. How about retail table?

A. No, he always showed me goods in the case.

(Testimony of Meyer Wax.)
He had the goods in the case. Then I bought from him.

Q. How much stock did Mr. Judkis carry in his store? A. I couldn't tell you that.

Q. What do you think? A. I don't know.

Q. You can judge just generally from seeing the store?

A. Maybe carry about $12,000, 11 or 12,000. That is what I imagine. I don't know for sure.

Testimony of L. Robinson, for Defendant.

L. ROBINSON.

L. ROBINSON, a witness called on behalf of defendant, testified that he resides in Portland, Oregon; was in the drygoods and gents' furnishing business at #581 First Street; that he had been engaged in the drygoods business for some twenty-two years, and that he was acquainted with Mr. Judkis; they were friends. That he purchased merchandise from Judkis for the last three or four years in some quantities; that he bought only for cash, $10, $15, $25 to $30 at a time; that he paid wholesale prices for the same, and that Judkis was in the wholesale and retail business. Never asked Judkis whether he paid for the goods or paid the freight on the same, and it was not customary to ask [40] such questions. That a sale to Horenstein of thirty-six pairs of shoes at cost less freight was not out of the ordinary course of business; that it was usually done every day in the week.

Testimony of M. Wilnitsky, for Defendant.

M. WILNITSKY.

M. WILNITSKY, a witness called on behalf of defendant, testified as follows: That he is a second-hand dealer in business on Madison Street between Front and First Streets; been in business for six years; that he had lived in Portland for eight years and knew Mr. Judkis two or two and a half years, but not very well; that he had purchased goods from Judkis five or six times, some overalls and shirts, but not very many.

Testimony of H. Horenstein, in His Own Behalf.

H. HORENSTEIN.

H. HORENSTEIN, a witness in his own behalf, testified as follows: That he is in the barber business, and has a supply store too; that he used to have two stores, but that he buys everything in the world. That between the months of July and October, 1917, he purchased from L. Judkis goods of approximately $1,000 in value; he don't remember how much, maybe $400, maybe $500, maybe $600, maybe $700, maybe $800. That he knew Judkis for about four or five years; had business dealings with him for that period of time, in fact, was formerly in partnership and in business with him at one time, and was pretty friendly with him at all times, and frequently purchased goods from him at wholesale and retail; that Judkis conducted a wholesale and retail business. That he loaned Judkis money; sometimes he borrowed money from Judkis. Also purchased goods from Judkis at retail, aggregating,

(Testimony of H. Horenstein.)
during the period in question, approximately $180. That among the goods bought at [41] wholesale during said period were thirty-six pairs of shoes at $225, five raincoats at about $5 a piece, six raincoats at about $5 a piece, two dozen corduroy pants, ten pairs corduroy pants at $1.75 each, fourteen pairs of corduroy pants at $1.90 each, six dozen aprons at $6 a dozen, six pairs top shoes, four dozen cotton pants at $19, two dozen overalls and two dozen jumpers at $10 a dozen. Goods purchased from Judkis were paid for by Horenstein, and were purchased in the usual course of business by Horenstein. The witness in answer to the following questions answered as follows:

Q. Now, I will ask you whether you recall testifying before Mr. A. M. Cannon, referee in bankruptcy, at a hearing some months ago. Do you recall that?

A. Was I over there?

Q. Yes. A. I was over there.

Q. You testified. Do you recall testifying there that Mr. Judkis was in the retail business?

A. I testified over there that he was in retail and selling what you call wholesale. So what you call about—what do you call that?

Q. Bulk? A. Bulk.

Q. Do you recall testifying that Mr. Judkis was not doing a wholesale business?

A. No, I didn't say that.

Q. You did not? A. No.

Q. All right. Did you not testify at that time that Mr. Judkis was not in the wholesale business?

(Testimony of H. Horenstein.)

A. Not all the time. I testified not all the time. Sometimes you know he sell wholesale, and sometimes not wholesale, but bulk, you know, you asked me that time the question. You know I didn't know what you called that, that word was. I told you all the time, sometimes retail, sometimes wholesale.

Q. Listen to this examination now, and tell me, whether you so testified:

> "Q. You knew Mr. Judkis was a retail merchant? A. Yes. Q. You knew he was selling goods at retail out of a retail store? A. I knew he used to have a retail store, but he sold lots too, yes. Q. Did you know he was a retail merchant? A. Yes, surely he had a retail store. Q. You knew he was not in the wholesale business? A. No, but he did it sometimes." **[42]**

A. That is what I say now.

Witness further testified that the goods purchased in bulk from Judkis were bought for the purpose of being sold to other merchants, and were so sold. That he purchased goods at wholesale from merchants other than Judkis, and also purchased bankrupt stocks.

Testimony of M. Glickman, for Defendant.

M. GLICKMAN.

M. GLICKMAN, a witness called on behalf of defendant, testified as follows: That he was in the clothing and shoe business in the city of Portland, Oregon, and that he conducts a wholesale and retail business at Second and Alder Streets, Portland,

(Testimony of M. Glickman.)
Oregon, and carries about $15,000 to $20,000 of stock, and had been in business in Portland for the last fifteen years. That he is acquainted with Louis Judkis, the bankrupt; has known him for four or five years. That Judkis had a clothing and shoe store on First Street, and used to sell retail, some wholesale, same as we did. That in 1916 witness bought from $100 to $200 of ladies' goods from Judkis at 60¢ on the dollar; that the transaction was usual. It was usual to sell merchandise and lose the freight, and many do that and even discount 10 or 15 per cent in order to get rid of stock they couldn't use. Witness purchased from Horenstein, the defendant, the Mason Shoe Company shipment of shoes for $233, which were purchased by Horenstein from Judkis, on which Horenstein claimed to have made $8. The goods were purchased by the witness from Horenstein on about twenty to thirty days' time, at the time they were purchased a check dated ahead being given to Horenstein for them by witness. The witness and Horenstein were good friends, witness having borrowed money from him and having loaned him money. [43]

Testimony of M. Cohen, for Defendant.

M. COHEN.

M. COHEN, a witness called on behalf of the defendant, testified as follows: That he was in the wholesale and retail business on First and Salmon streets in the city of Portland, Oregon; had been in business in Portland for ten years; that he sells

(Testimony of M. Cohen.)

retail and wholesale; that he is acquainted with Mr. Judkis and knew the kind of business that Judkis was conducting; that their places of business were only two blocks apart; that he bought goods from him in bulk on one occasion, in 1916—one dozen overalls at wholesale price. Judkis was selling wholesale and retail. Judkis had only one store. Witness knew of no wholesale store in Portland that sold only for cash.

The above statement of the evidence and testimony, to be included in the record upon appeal in the above-entitled cause, having been made by the Court to conform to the requirements of rule 75b of Rules of Practice for the Courts of Equity of the United States, and being now true, complete and properly prepared, same having been done under direction of the Court, is hereby approved.

CHAS. E. WOLVERTON,

Judge.

Dated at Portland, Oregon, this 5th day of March, 1919.

Filed March 5, 1919. G. H. Marsh, Clerk. [44]

And afterwards, to wit, on the 11th day of March, 1919, there was duly filed in said court a praecipe for transcript, in words and figures, as follows, to wit: [45]

In the District Court of the United States for the District of Oregon.

No. 7860.

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Praecipe for Transcript of Record on Appeal.

To G. H. Marsh, Esq., Clerk of the District Court of the United States for the District of Oregon.

Please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit copies of:

Citation on Appeal.

Complaint.

Answer.

Narrative Statement of Evidence.

Opinion of the Court.

Decree.

Petition for Appeal.

Order of Allowance of Appeal.

Assignment of Errors.

This Praecipe.

Dated at Portland, Oregon, this 11th day of March, 1919.

TEISER & SMITH,
By SIDNEY TEISER,
Attorneys for Pltff.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

Due service of the within Praecipe is hereby accepted in Multnomah County, Oregon, this 11th day of March, 1919, by receiving a copy thereof duly certified.

FRED. H. DRAKE,
Attorney for Defendant.

Filed March 11, 1919. G. H. Marsh, Clerk. [46]

Certificate of Clerk U.S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing pages numbered from 2 to 46, inclusive, constitute the transcript of the record upon appeal from the District Court of the United States, for the District of Oregon, in the case in which R. L. Sabin, Trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, is plaintiff and appellant, and H. Horenstein is defendant and appellee. That the said transcript has been prepared in accordance with the praecipe of the appellant filed in said cause and is a true and complete transcript of the record and proceedings had in said cause in said court as the same appear of record and on file in my office and in my custody.

And I further certify that the cost of the foregoing transcript is $14.30, and that the same has been paid by the said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 27th day of March, 1919.

[Seal] G. H. MARSH,

Clerk. [47]

[Endorsed]: No. 3321. United States Circuit Court of Appeals for the Ninth Circuit. R. L. Sabin, as Trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, Appellant, vs. H. Horenstein, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 29, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. JUDKIS, Bankrupt,

Plaintiff,

vs.

H. HORENSTEIN,

Defendant.

Order Under Rule 16 Extending Time to and Including April 15, 1919, to File Record and Docket Case.

This cause coming on this day to be heard upon motion of plaintiff, by Teiser & Smith, his attorneys, for an order extending the time within which to file and docket the record of this cause upon appeal, and it appearing to the Court for good cause shown that said motion should be allowed and said time extended, IT IS ORDERED that the time within which to file the record and docket the above-entitled case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and until the 15th day of April, 1919.

Dated Portland, Oregon, February 13, 1919.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Apr. 15, 1919, to File Record Thereof and to Docket Case. Filed Mar. 1, 1919. F. D. Monckton, Clerk. Refiled Mar. 29, 1919. F. D. Monckton, Clerk.

No. 3321

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. Judkis, bankrupt,
Appellant

vs

H. HORENSTEIN,
Respondent

BRIEF OF APPELLANT

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BOYER PRINTING CO., 85 FIFTH STREET

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. Judkis, bankrupt,
Appellant

vs

H. HORENSTEIN,
Respondent

BRIEF OF APPELLANT

STATEMENT OF FACTS

L. Judkis, a merchant doing business as the American Clothing Company, on First Street, Portland, Oregon, carrying a stock of men's furnishings, clothing and shoes of about $11,000 to $12,000, was adjudged bankrupt on December 10th, 1917, upon a petition filed prior to that time.

During the months of August, September, October and November, 1917, in addition to his retail sales, he disposed of merchandise in lots to other merchants or speculators to an extent of approximately $6,000 to $8,000, at least. These

sales were made upon a rising market, for cash, and practically none of them at a profit. In most instances they were made at cost less freight. The goods thus sold were purchased on credit by the bankrupt and not paid for. The bankrupt had approximately sixty merchandise creditors, most of whom were wholesalers located in the East, and none of the purchases from any one of these wholesale houses amounted to more than $600, and most of them were from $100 to $300, the bankrupt buying from numerous houses carrying the same line of goods and scattering his purchases. (See List of Claims Filed and Allowed, Transcript p. 41.)

It is conceded that the bankrupt was endeavoring to defraud his creditors by this manner of conducting his business. Said the learned judge below in the course of his opinion:

> "I will say in passing that I have read the testimony in the bankruptcy matter, which has come up for review from the Referee in Bankruptcy, of Mr. Judkis, and there is no doubt in my mind but what Mr. Judkis was doing a fraudulent business; that is to say, he was attempting to defraud his creditors; and there are indications, taking into account the testimony of the witnesses who have purchased from Judkis, from which inferences may be drawn, that there were others in his design to defraud as well as himself, and that it was rather a combination than the act of

> one person. It looks that way to me. And if the combination could be ferreted out, it might be that others might be made responsible as well as Judkis for these transactions."

The method which Judkis adopted for perpetrating the fraud mentioned was: He bought goods from a large number of wholesale concerns located out of Oregon, and generally in the East. He bought no particularly large bills from any one concern. No one creditor therefore would be sufficiently interested or near enough at hand to follow his acts closely and actively. As the goods reached Portland they were placed in a storeroom near his store, which he had rented temporarily for the purpose. His excuse for renting this storeroom was that rats infested his store and damaged his goods, and therefore a storeroom was necessary to protect his merchandise from rodents. The windows of this storeroom were covered with paper so that no one could see therein. He would then offer to sell certain lots of goods to other retail merchants in the vicinity of his store, all of whom were friends of his, including the defendant, the latter of whom had also been a partner in business transactions. The goods were usually sold at cost, or less, upon a rising market, and at a time when merchandise was scarce. The goods were always new and usually just received. The money would be retained by Judkis, or used for his purposes, but the goods were not paid for therewith, nor were merchandise creditors

paid therefrom. In one particular transaction, that of a certain lot of shoes purchased from the Mason Shoe Manufacturing Company of Chippewa Falls, Wisconsin, Horenstein, the defendant, purchased these shoes shortly after they arrived, paying therefor only invoice price, upon a rising market, scare of merchandise, and Judkis losing thereon the freight to Portland and drayage. Horenstein paid cash for these goods in the amount of $225.00, and immediately sold them to a retail merchant, (said merchant being a personal friend of Judkis and of Horenstein, and subsequent to bankruptcy an employer of the bankrupt) for a profit of $8.00 and on credit.

(Transcript p. 55.)

Other transactions were of similar character, although the origin of the goods were not so closely traced. Purchases of goods by Horenstein, the defendant, from Judkis, the bankrupt, extended over a period of three months, and aggregated approximately $1,000, so far as could be discovered, and the methods were of like character, sometimes, however, the amount being smaller.

Horenstein, the defendant, was a speculator in stocks of merchandise, claiming, according to his testimony, to "buy everything in the world." His real business was that of a barber. (Transcript p. 52.)

Some five or six other parties—retailers, and all of them personal friends of Judkis, one of them a present employer of Judkis,—purchased merchandise in quantities from him during the

same period, in a similar manner, practically all of them testifying, and practically all of them claiming that Judkis was doing a jobbing business in connection with his retail business. Salesman and sales managers from several wholesale houses in Portland, calling upon Judkis frequently in the course of their business, testified on behalf of the plaintiff that Judkis was doing a retail business and a retail business only, conducting a retail store and selling goods over the counter. (See testimony of Jacob H. Ballin of Neustadter Bros., Transcript p. 29; testimony of James Bamford of Goodyear Rubber Co., Transcript p. 36, 37, and testimony of Anselm Boscowitz of Fleischner, Mayer & Co., Transcript p. 31.) His store, it is admitted, was fitted up as a retail store, (Transcript p. 34, 37 and 50) he advertising in a newspaper sales of merchandise at retail. (Transcript p. 43.) He admits that he was doing a retail business, but that sometimes he sold at wholesale. (Transcript p. 22.) It was testified that the houses from whom he bought sold only to retailers and not to jobbers. (Transcript p. 40) and that there was no wholesale or jobbing house in the West that sold only for cash, (Transcript p. 39) although Judkis' sales were always only for cash. Horenstein admitted that he testified before the Referee in Bankruptcy that Judkis had a retail store, and that he was not in the wholesale business, but that he sold wholesale sometimes, and this statement of his was affirmed on the stand before the trial court in the present trial. (Transcript p. 54.)

Judkis frequently borrowed money from

Horenstein, the defendant,—$200, $300 or $400 at a time, and upon one occasion when he asked Horenstein to lend him more money, Horenstein told him that he did not have any money that he could let him have, so Horenstein was told by Judkis that he would sell him some merchandise whereby Horenstein could make a profit and at the same time accommodate him by letting him have a few hundred dollars, and that was the origin of the bulk purchases by Horenstein (Transcript p. 21). Judkis frequently loaned money to Horenstein and Horenstein to Judkis. (Transcript p. 52.)

The court held that such sales made by Judkis were not in contravention of the Oregon "Sales in Bulk Act" and therefore not void.

APPELLANT'S POSITION

The trustee endeavored to recover from Horenstein the value of the goods so purchased by him, claiming that they were purchased contrary to the act known generally, although perhaps improperly, as the Oregon "Sales in Bulk Act." (It is probable that the misnomer in calling this act the "Sales in Bulk Act" gave rise to the decision by the trial court which it is contended was erroneous, since the act should more properly be known as *"Sales Out of the Usual Course of Business Act.")* The trustee's position was that the sale to Horenstein by Judkis was in fraud of creditors, and being a sale out of the usual course of business, and Horenstein not having notified

creditors of Judkis of the contemplated purchase, it was void, and that the goods purchased, or their value, were recoverable by the trustee from Horenstein.

ASSIGNMENT OF ERRORS

There are seven assignments of errors. All of them, however, may be summarized into one assignment, namely:

That the sales made by Judkis to Horenstein were out of the usual course of business, and therefore void under Sections 6069 to 6072 of Lord's Oregon Laws, as amended by General Laws of Oregon, 1913, pages 537 to 540, in view of the fact that Horenstein did not demand from Judkis, the vendor, the requisite certificate prescribed by Section 6069, Lord's Oregon Laws, nor did he give the notice prescribed by Section 6070 as amended.

STATUTORY LAW OF OREGON REGARDING SALES OF MERCHANDISE

Section 6069 Lord's Oregon Laws as amended by General Laws of Oregon, 1913, page 538, provides:

> "It shall be the duty of every person who shall bargain for or purchase any goods, wares or merchandise, in bulk, * * * to demand

> and receive from the vendor thereof, * * * and at least five days before paying or delivering to the vendor any part of the purchase price or consideration therefor, or any promissory note or other evidence of indebtedness therefor, a written statement under oath containing the names and addresses of all of the creditors of said vendor, together with the amount of indebtedness due or owing, or to become due or owing, by said vendor to each of such creditors * * *."

and makes it the duty of the vendor to thus furnish such statement under oath.

Section 6070 Lord's Oregon Laws as amended, provides that the vendor shall give notice to creditors at least five days before the consummation of such sale of his purpose in making the purchase, and upon his failure to do so, "such purchase, sale or transfer shall, as to any and all creditors of the vendor, be conslusively presumed fraudulent and void."

Section 6072 Lord's Oregon Laws defines what is deemed a sale in bulk, and is as follows:

> "Any sale or transfer of goods, wares or merchandise, * * * out of the usual or ordinary course of business or trade of the vendor, or whenever thereby substantially the entire business or trade theretofore

> conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons shall be deemed a sale or transfer in bulk, in contemplation of this act; *provided,* that nothing contained in this act shall apply to sales by executors, administrators, receivers or any public officer acting under judicial process." (The omitted portion shown by asterisks concerns only fixtures and equipment.)

Prior to the amendment of Section 6070 Lord's Oregon Laws in 1913, the section read:

> "Any sale or transfer of a *stock of goods,* wares, or merchandise out of the usual or ordinary course of the business or trade of the vendor, —or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons,—shall be deemed a sale or transfer in bulk, in contemplation of this act; *provided,* that nothing contained in this act shall apply to sales by executors, administrators, receivers, or any public officer acting under judicial process."

ARGUMENT

Section 6072 Lord's Oregon Laws, prior to its amendment, inhibited any sale or transfer of a *stock* of merchandise, or substantially the *entire business or trade* theretofore conducted by the vendor. The Legislature in 1913, however, *left out any reference to a stock* of merchandise, and provided as follows:

> "*Any sale* or transfer of goods, wares or merchandise * * * *out of the usual or ordinary course of business* or trade of the vendor, *or* whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons shall be deemed a sale or transfer in bulk * * *." (Italics ours.)

It is therefore seen that by legislative enactment the proscription against a *sale of a stock of merchandise* was broadened into a proscription against *any sale or transfer of goods, wares or merchandise out of the usual course of business;* therefore, by legislative interpretation the inhibition extends to *any sale of merchandise out of the usual course* of business, and has no reference as to whether all or nearly all, or a substantial portion of a stock of merchandise is sold. All

that is necessary under the section, as amended, in order for a sale to come under the prohibition of the statute, and to require notice to creditors, is either, (1) that the sale be out of the usual course of business, *or* (2) that it be of substantially the entire business or trade theretofore conducted by the vendor. One or the other of these requirements is sufficient.

The learned judge below seemed to eliminate the first requirement, and to treat the statute as it existed before the amendment removed the ambiguity.

It is apparent from a reading of the opinion of Judge Wolverton that the significance of this amendment was not clearly perceived by the court, as in the course of his opinion the judge says:

> "It seems to me that the spirit of this statute is to prevent persons who are dealing in merchandise from disposing of their entire stock, or of the larger proportion of it, or of such a proportion of it as will render the vendor less able to pay his obligations. I do not think it applies to small sales in bulk, or to sales that do not materially affect the vendor's solvency, if I may put it in that way. That interpretation of the statute appears from the statute itself * * *
>
> "So that sales in bulk must be read with reference to each particular business, and it must be such a sale as will indicate the vendor is in-

> tending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solvency, and render him unable to pay his debts in the usual course."

It is maintained, with respectful deference to the opinion of the Judge below, that the statute as amended placed no such limitation upon the inhibited sale. It is not necessary that the sale inhibited by the statute should be such that would indicate that the vendor was "intending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solvency, and render him unable to pay his debts in the usual course." On the other hand *all that is necessary is that such sale should be out of the ordinary course of business of the vendor.*

The purpose of the statute is evident. Where one, intending to defraud his creditors, sells goods out of the usual course of his business, that sale out of the usual course of business is sufficient to put the purchaser upon notice that a fraud might be contemplated. It is not customary, for example, as in the case at bar, for a retail merchant to sell a large portion of goods at cost, or below cost, to a barber or to other merchants or speculators for cash, or for that matter on credit. The fact that one conducting a retail business sells goods in quantities to another is sufficiently out of the usual course of business to put the person buying the goods on notice, and require him

to give the usual notice to creditors. If he fails to do this and closes his eyes, he must suffer the consequences. As said in the case of *Dokken v. Page, 147 Fed. 438, 439:*

> "It is full time that speculating purchasers from insolvent debtors should know that under the bankrupt act they cannot stop their ears and shut their eyes lest they may hear or see that such a merchant as Tveten was selling out his entire stock of goods in order to defeat his creditors in the collection of their just claims. Such speculators on chance seem to think that they can escape the statute by studiously and cunningly placing themselves in a position to half satisfy conscience by saying: 'I did not know the vendor was bankrupt. He did not so inform me; and I did not ask him. I did not know about his creditors, as I did not examine his books. I did not take an inventory of the goods or carefully examine them, as I had a general knowledge of their character, and did not look further'—and the like."

There has been no interpretation in Oregon of the statute as amended, or for that matter even before amendment, to the effect that it is necessary that all or substantially all of a stock of goods be sold in order to constitute a sale in bulk, as defined by the statute. In fact, the statute

specifically asserts otherwise. It is true that most of the sales which have come before the courts in Oregon, or elsewhere, were sales of an entire stock and at one time, but it does not seem consonant with the purpose of the statute that a sale of all of one's stock should be void only if made at one time, and yet sales in quantities from time to time, extending over a period, of all or nearly all of one's stock should be valid. According to the decision rendered, if a sale had been made by Judkis to a purchaser, or a group of purchasers, at one time of his entire stock, it would have been void, unless the provisions of the statute had been complied with, whereas, if Judkis had sold a third of his stock today to one person, a third of it tomorrow to another person, and a third of it the next day to another person, it would not have been void, unless a third could be construed to be practically the entire business, or such a proportion of the business as would impair solvency. It is earnestly maintained that *the test is not quantity*. The *test is whether or not the sale is out of the usual course of business* and thus calculated to excite sufficient suspicion in the mind of an honest purchaser that it might be done for the purpose of defrauding creditors. A sale in large quantities, especially a sale of all of one stock, is usually sufficiently out of the course of one's business to put a purchaser on notice, but it is not the only circumstance which might thus put one on notice. One of the two statutory tests in Oregon is whether the sale was out of the *usual course* of business; the other being whether substantially the entire business is sold. If *either*

of these two circumstances occur, notice must be given to creditors.

Prior to the enactment of the sales in bulk statutes, one of the badges of fraud usually spoken of in discussions of fraudulent conveyances of personal property was a sale out of the usual course of business. That, along with inadequacy of price, haste, the omission of the common preliminaries of negotiation, and other unusual circumstances, were mere *indica* of fraudulent purpose on the part of the seller and as against creditors were sufficient to put upon inquiry the purchaser, and if no inquiry was made, the presumption—prima facie at least—was that the sale was fraudulent. The modern statutes, restricting the sales of merchandise other than in the usual course of trade, are merely a broadening of the common law of fraud, making the presumption of fraud conclusive instead of prima facie, unless certain requirements are complied with.

WAS THE SALE TO HORENSTEIN OUT OF THE USUAL COURSE?

Applying the principles directly to the question at issue: Was a sale to Horenstein by Judkis of, for example, the Mason shoes, aggregating $225, at cost, less freight and drayage, upon a rising market, for cash, such a sale as would be sufficiently out of the usual course as to put an honest purchaser upon notice? It will be seen in this connection that there are many other

things entering into this sale than the question of quantity as stamping it out of the usual course of business:

First, it was prompted, not only by a readiness to sell and a desire to purchase the particular goods in question, *but by a need of money, openly expressed by Judkis, after a request for a loan had been denied by Horenstein.*

Second, it was a sale of new merchandise, for which there was a steady demand upon a market which was rising, and at a time when there was a scarcity of the articles.

Third, the purchase was for cash.

Fourth, they were purchased for resale in bulk at a very small margin of profit, and upon credit.

Fifth, the purchaser, Horenstein, was an intimate friend of the seller, Judkis, and the goods were resold to another friend of both parties, who after bankruptcy became the employer of the seller.

Sixth, Horenstein, himself, was not a merchant, but a barber, purchasing at times bankrupt stocks and job lots of merchandise for resale in bulk.

Were these circumstances sufficient to stamp that sale one out of the usual course of business? If it was, then all the sales to Horenstein were out of the usual course of business, and are therefore void.

Section 35 of the Bankruptcy Act of 1867 pro-

vided that if a "sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud." The enactment probably gave definite form to the rule existing in common law.

There are several cases in the books interpreting this section of the Bankruptcy Act, although unquestionably each case will stand or fall on its own peculiar facts.

In *Schrenkeisen v. Miller, 21 Fed. Cas. p. 733,* Case No. 12,480 (D. C. N. Y.) Stein, a manufacturer, used walnut logs for manufacturing chairs. He had on hand sixty-seven of these logs, which he sold to Miller. Said the court:

> "It is quite clear, on the testimony, that the sale to Miller was not made in the usual and ordinary course of business of Stein, as such course was known to Miller. This fact is, therefore, prima facie evidence of fraud, and throws on Miller the burden of showing that there was no violation of section 5129 of the Revised Statutes," (Sec. 35, Bankruptcy Act of 1867.)
>
> "As to Miller, there was sufficient to put him on inquiry, to ascertain the condition of the affairs of Stein, when Stein, a buyer of logs and a chair-maker, was sending to him, Miller, to come and see him, and was offering to sell him a quantity of

> logs which, so far as appears, were all the logs Stein had, and which Miller could easily have ascertained to have been only recently purchased by Stein."

In *In re Knopf, 144 Fed. 245, 248,* one Knopf was declared bankrupt. He had purchased merchandise to a considerable extent. No money was paid to his merchandise creditors. A sale of his stock was made by him to one Sanders, and the court says:

> "The rule is of general application, that any unusual transaction sufficient to excite attention and put a party on inquiry, is notice of everything to which such inquiry would have lead, and that any ignorance of the fact due to negligence is equivalent to knowledge in fixing the rights of the parties."

In *Walbrun v. Babbitt, 16 Wall. 577, 581; 21 L. Ed. 489,* which was a case arising under the Bankruptcy Act of 1867, the court says:

> "Section 35 of the bankrupt law condemns fraudulent sales equally with fraudulent preferences, and declares that, if such sales are not made in the usual and ordinary

course of business of the debtor, they should be prima facie evidence of fraud. The usual and ordinary course of Meldenson's business was to sell at retail a miscellaneous stock of goods common to country stores in a small town in the interior of the state of Missouri. It was to conduct a business of this character that the goods were sold to him, and as long as he pursued the course of a retailer, his creditors could not reach the property disposed of by him, even if his purpose at the time were to defraud them. But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrance, out of the ordinary mode of transacting such business, is prima facie evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. Summerfield seeks to overthrow the legal presumption that Mendelson intended to commit a fraud on his creditors by showing that he paid full value for the goods in ignorance of the condition of Mendelson's affairs, but the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's business. This he did not do, nor did he

make any attempt in that direction. Indeed he contented himself with limiting his inquiries to the object Mendelson had in selling out, and his future purposes. Something more was required than this information to repeal the presumption of fraud, which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain a sale, the provision of the bankruptcy law we are considering would be no protection to creditors, for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield had employed any means at all directed to this end, he would have discovered the actual insolvency of Mendelson. In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

It will be noted that in all of these cases under the former Bankruptcy Act, where sales out of the usual course of business were made only prima facie fraudulent, evidence of good faith could be introduced to repel the presumption. Under the Oregon statute, of course, the presumption of fraud is conclusive. In the two latter cases above cited, the sale was of the entire stock of merchandise, but that, of course, was not the criterion. The criterion was whether the sale in that manner was out of the usual course of business. There is no doubt that the same reasoning would have been used had any considerable quantity of the stock been disposed of, or were any other unusual circumstances connected with the sale.

In Massachusetts, for example, Section 11, Chapter 136, page 1453-4, Revised Law of Massachusetts, 1902, provides that, "If such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief." (i. e., cause of a belief that a preference was intended.)

In the case of *Jaquith v. Davenport, 197 Mass. 397, 401,* it became necessary to determine whether a certain sale was out of the usual course of business, so as to determine whether or not the purchaser had reasonable cause to believe a preference was intended. There a dealer in cigars and tobacco made sales of two lots of cigars—one on March 11th, 1896, and another on March 31st, 1896, aggregating $1875 and $1390 respectively, but these lots did not constitute all nor nearly all of the entire stock of the seller. A

petition in insolvency was filed against the seller on April 25th, 1896. The court, discussing the sales, determined that they were out of the usual course of business.

There is also a statute in Massachusetts concerning the sale of merchandise in bulk. This statute is much less restrictive than the Oregon statute. It was, however, held in the case of *Hart v. Brierly, 189 Mass. 598, 602, 75 N. W. 286,* that:

> "The statute test is whether the sale is made in the usual way in which a merchant, owing debts, conducts his business, or whether he takes an unusual method of disposing of his property in order to get the money for his own use and leave his creditors unpaid."

And so in *In re Calvi (D. C. N. Y.) 185 Fed 642,* it was held that under the New York statute, requiring notice to creditors, where there was a "transfer of any portion of a stock of goods, wares or merchandise, otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferrer's business, or the transfer of an entire such stock in bulk," a sale to two different purchasers of shoes in bulk, was presumptively fraudulent.

TESTIMONY

Before concluding this brief, attention generally will be called to the character of testimony adduced by the defendant in the endeavor to show that Judkis, the bankrupt, was doing a jobbing business, and therefore that the sales were in the usual course.

All the witnesses for the plaintiff, called for that purpose, testified that Judkis was in the retail business, and in the retail business only, and that the sales to Horenstein were out of the ordinary course of business.

The following witnesses for the defendant testified in this respect as follows:

Judkis, himself, claims that he was in the retail business, but that he sold wholesale sometimes, as will be seen from the following: (Transcript p. 22.)

Q. Now, what was the kind of business that was conducted by the American Clothing Company, by you doing business as the American Clothing Company?

A. I been selling retail—retail and a little doing jobbing.

Q. You were selling at retail?

A. Retail, mostly at retail and a little jobbing.

Horenstein, the defendant, likewise claimed that Judkis was a retail merchant, but that he sold wholesale sometimes. (Transcript p. 54.)

Solomon, a retail merchant who purchased goods from Judkis, testified, "Today everybody is a jobber. When I have so much of one kind or odds and ends, I sell it out at cost or below cost. I am not doing exactly a jobbing business, but when I have too much of one article I sell it to another dealer." (Transcript p. 44.)

Glickman testified (Transcript p. 55), "that Judkis had a clothing and shoe store on First Street, and used to sell retail, some wholesale, same as we did."

Meyer Wax testified that Judkis was engaged in the retail business and partly wholesale, and that Judkis' store was fitted up as a retail store.

(Transcript p. 50.)

These witnesses and the other witnesses called by the defendant, namely, L. Krause, L. Robinson and M. Wilnitsky, were personal friends of the bankrupt and of Horenstein, and all of them had made like purchases from Judkis, which, if the present suit were maintainable, would place them under the liability to refund the goods purchased by them, or their value, to the trustee. No disinterested witness was called by the defendant to show the character of Judkis' business, nor to testify that such sales as made by Judkis to Horenstein would have been in the usual course of his business.

It is very plain and apparent that Judkis was doing a retail business. It has been found and is likewise very apparent, that Judkis was planning to defraud his creditors. With that end in view, his plan was to purchase goods on credit and to dispose of them for cash as quickly as possible. Horenstein, himself, was not in the business of selling merchandise at retail. He was a barber by trade, and was buying bankrupt stocks and making quick turnovers of the stocks purchased. He and others, to whom goods were sold, were being used by Judkis as a means of defrauding his creditors, and it is inconceivable that Horenstein, under the circumstances, did not know that the sales proposed by Judkis to him, in the manner in which they were proposed, were out of the usual course of business of Judkis. The fact is, that Judkis endeavored to borrow money from Horenstein, as was his custom, but that Horenstein refused to lend him further money; whereupon Judkis proposed that he would sell him goods for cash from which he, Horenstein, could make a profit. Certainly, under these circumstances, the sale was not in the ordinary course of Judkis' business. It was a sale for the purpose of immediately raising money, and therefore out of the ordinary course.

* * * * * * * * * *

Had the trial judge perceived that a sale out of the ordinary course of business was inhibited by the statute, it is confidently asserted that he would have found that the sales were void, in that they were out of the usual course of trade. The eminent judge undoubtedly fell into an erroneous interpretation of the statute, due prob-

ably to the impression which he had of the provisions of the statute prior to its amendment.

It is therefore respectfully urged that the judgment below should be reversed.

Respectfully submitted,

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No. 3321

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

R. L. SABIN, trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, Appellant,

vs.

H. HORENSTEIN, Respondent.

BRIEF OF APPELLEE

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BEATTIE & HOFMANN, INC. 204 STARK STREET

IN THE

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vs.

H. HORENSTEIN,
Respondent.

BRIEF OF APPELLEE

STATEMENTS OF FACTS.

I.

OREGON BULK SALES ACT.

The act in question is entitled, "An Act to Regulate the Purchase, Sale and Transfer of Stocks of Goods, Wares and Merchandise in Bulk," as amended by the General Laws of Oregon, 1913, page 538. Section 6069 L. O. L. is as follows.

"Sec. 6069—Purchaser Must Demand Certificate from Vendor in What Case.—It shall be the duty of every person who shall bargain for or purchase any goods, wares or merchan-

dise in bulk or all or substantially all of the fixtures or equipment, * * * for cash or on credit, to demand and receive from the vendor thereof * * * a written statement" and makes it the duty of the vendor to furnish such statement under oath.

Section 6072 L. O. L., as amended by the General Laws of Oregon 1913, page 539 is as follows:

"Sec. 6072. What Deemed a Sale in Bulk. —Any sale or transfer of goods, wares or merchandise or all or substantially all of the fixtures or equipment * * * * out of the usual or ordinary course of the business or trade of the VENDOR or whenever thereby substantially the entire business or trade theretofore conducted by the Vendor shall be sold or conveyed or attempted to be sold or conveyed * * * * , shall be deemed a sale or transfer in bulk in contemplation of this act; * * * * "

II.

The right and remedy of the creditors under the bulk sales act are not different from the right and remedy of any other creditor whose debtor has disposed of his property in fraud of his creditors.

Kasper v. Cohen, 151 Pac. 800-801.
(Involving Washington Sales in Bulk Act, which is the same as Oregon Act.)

III.

To avoid a transfer under Sec. 67e of Bankruptcy Act it is incumbent upon complainant

to show actual fraud in the conveyance.

Coder v. Arts, 213 U. S. 223-242.

VI.

A transfer beyond or within the four months immediately preceding the filing of a petition in bankruptcy by or against a debtor is not sufficient to establish actual fraud in fact or an intent on his part or on the part of the person receiving the property, to hinder, delay or defraud other creditors.

Coder v. Arts, 152 Federal 943-947.

Meservey v. Roby et al, 198 Fed. 844.

V.

The law leans to the side of innocence and fraud will not be presumed and the burden is on the party charging fraud.

Shera v. Merchants' Life Ins. Co., Federal 484-486.

IV.

When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made the finding or decree must be permitted to stand.
of fact has been made the finding or decree must be permitted to stand.

Coder v. Arts, 152 Federal 943-946.

Statement of Facts

This is a suit brought by R. L. Sabin, a trustee in bankruptcy of the estate of L. Judkis, to recover the value of goods alleged to have been purchased by Defendant Horenstein of the bankrupt Judkis between July 1st, 1917 and October 31, 1917, out of the usual or ordinary course of the business or trade of said bankrupt, without first complying with the requirements of the Oregon "Sales in Bulk Act." (Transcript, pp. 2 to 6 inclusive.) The contention of plaintiff is denied by defendant who affirmatively alleges, that during the time covered by plaintiff's complaint, and long prior thereto, the bankrupt was engaged in and carried on a wholesale and retail mercantile business, and that all the goods purchased by defendant were purchased in the usual, customary and ordinary course of the business or trade of said bankrupt. (Transcript, pp. 7 to 8 inclusive.)

Upon the issue thus joined the cause was tried before the Honorable Charles E. Wolverton, United States District Judge, and the following facts established:

That during the year 1913, L. Judkis and another engaged in the mercantile business in Portland, Oregon, and said partnership continued for seven to nine months. Upon dissolution of said partnership, said Judkis continued the business under the name of "American Clothing Company," up and until the bankrupt proceedings against Judkis the latter part of 1917 . (Transcript p. 22.)

During all of said time a retail and wholesale business was carried on by said partner-

ship and "American Clothing Company," and merchandise sold at wholesale to the defendant Horenstein as well as numerous other merchants. (Transcript, pp. 12 to 14 inclusive; pp. 22 to 27 inclusive; pp. 44, 48, 50, 51, 52, 55 and 56.)

From time to time and in various amounts ranging from $6.00 to $225.00, during the months of July, August, September and October 1917, Defendant Horenstein purchased of Judkis and paid for about $1,000.00 worth of merchandise; included in said sum were purchases at retail amounting to about $180.00 (Transcript pp. 23 to 28) which said purchases were made without comply with requirements of the Oregon "Sales in Bulk Act."

The largest purchase made by Defendant Horenstein during said period of time was 36 pairs of shoes, for which he paid $225.00—invoice price less freight. This being the only transaction in so far as is disclosed by the record upon which the bankrupt Judkis did not make a profit. Defendant Horenstein, in turn, sold said shoes at a profit of about $8.00.

Among the other goods purchased at wholesale during the said period by the defendant were 5 raincoats at $5.00 each—6 raincoats at $5.00 each—10 pairs corduroy pants at $1.75 each—14 pairs corduroy pants at $1.90 each—6 dozen aprons at $6.00 per dozen—6 pairs of top shoes—4 dozen cotton pants at $19.00—2 dozen overalls and 2 dozen jumpers at $10.00 a dozen.

The defendant Horenstein was engaged in the barber business, had a supply store and used to have two stores. He had purchased

goods at wholesale from merchants other than Judkis and also purchased bankrupt stocks. On one occasion he purchased from Judkis a bankrupt stock which plaintiff sold to Judkis.

L. Judkis was adjudged a bankrupt in December, 1917, and thereafter R. L. Sabin was appointed trustee of said estate. The assets of said estate were not sufficient to pay the creditors in full. The Court thereupon rendered its opinion, which is in part, as follows:

OPINION OF THE COURT.

WOLVERTON, District Judge.

This is an action by R. L. Sabin, Trustee in Bankruptcy of the estate of L. Judkis, plaintiff, against H. Horenstein, defendant. The action is based upon the statute which is designed to prohibit the sale of merchandise stocks in bulk. The statute itself provides that it shall be the duty of every person who shall bargain for, or purchase goods in bulk to require of the vendor a statement of the goods, containing the purchase price, and this statement is to be under oath. Then it devolves upon the purchaser to notify the creditors of the vendor of the proposed sale, in order that the creditors may be warned or advised of what is going to take place, so that if necessary they can protect themselves.

The term "sales in bulk" is defined by Section 6072, and, so far as it applies to this case, the definition is this:

"Any sale or transfer of goods, wares or merchandise, * * * * out of the usual or ordinary course of the business or trade of the

vendor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons."

It seems to me that the spirit of this statute is to prevent persons who are dealing in merchandise from disposing of their entire stock, or of the larger proportion of it, or of such a proportion of it as will render the vendor less able to pay his obligations. I do not think it applies to small sales in bulk, or to sales that do not materially affect the vendor's solvency, if I may put it in that way. That interpretation of the statute appears from the statute itself in reading further as to the definition of sales in bulk. The statute says: "Any sale or transfer of goods, wares or merchandise, or all or substantially all of the fixtures or equipment used, or to be used in the sale, display, manufacture, care or delivery of said goods," etc., and then it says, "out of the usual or ordinary course of the business or trade of the vendor, or whenever thereby substantially the entire business or trade" is to be disposed of.

So that the sale in bulk must be read with reference to each particular business, and it must be such a sale as will indicate that the vendor is intending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solveny, and render him unable to pay his debts in the usual course.

I will say further that, where a sale in bulk is made within the provisions of the statute, that sale is conclusively presumed fraudulent and void. So, therefore, where a sale in bulk

is made I presume suit will lie to recover back the goods that have been purchased, where the vendee is aware of the conditions under which he is purchasing.

In this case, the attempt is not to recover back the goods, but to recover the value of the goods which the vendee has purchased. I presume that may be resorted to where the vendee has parted with the goods that he has purchased.

Now, in the present case Judkis was doing business for himself for several years—I think from 1914—and he says that he was doing **both a retail and jobbing business.** That is his testimony, or the effect of it.

It has been shown that he has on numerous occasions sold goods in jubbing lots. Some eight or ten witnesses have appeared upon the stand here who testify that they have so purchased from him. These purchases have extended back for some period. The bulk of the purchases were made, I think, within the last three or four months of the time in which Judkis was in business; but it is evidence of the fact of the manner of his doing business. **These individuals who testified to their purchases in jobbing lots have not only testified that they have purchased in one lot, but they have purchased more than one lot. They have made purchases from time to time as high as eight or ten or more.** Take the defendant in this case. He testifies that he purchased from time to time different job lots of Judkis, and he has brought here as testimony of the fact the checks that he has issued in payment of the goods. Mr. Solomon was called as a witness here, and he also produced checks show-

ing that he had half a dozen or more transactions with Judkis in which he made purchases in job lots, and these checks are evidence of that fact. So it is with other witnesses. **When we put this testimony all together, we find that there are numerous instances in which purchases have been made in job lots. This is evidentiary of the fact which the defendant claims, that Judkis was doing a jobbing business as well as a retail business.**

It is said that this testimony is not reliable, but that cannot affect this case very materially, because there is no evidence, practically, to the contrary, and the Court must rely upon this testimony for its decision, or this kind of testimony. * * * * But upon the whole, the Court cannot say but what Judkis, as he claims, and as the defendant claims, **was doing, not only a retail business, but a jobbing business at the same time,** although in an irregular way. These people down there are seemingly out of touch with the regular way of doing business by the regular merchants; but the unusual way, by persistence in it, may become the usual way. **So in this case, Judkis, in selling in job lots, was selling in the usual way according to his own business transactions and his own business methods.**

I can see no other conclusion under the testimony in this case, and the complaint will be dismissed.

Whereupon a decree was duly and regularly entered dismissing the complaint, from which decree this appeal was taken.

AUTHORITIES See page 1

After a careful consideration of appellants' brief in this case and separating the wheat from the chaff we have concluded that the only point necessary to be discussed is: What was the usual or ordinary course of the business or trade of the vendor L. Judkis, or in other words was Judkis, the vendor, engaged in a wholesale or jobbing, as well as a reetail business?

ARGUMENT.

The construction placed upon the statute by the Honorable Chas. E. Wolverton, is in our opinion the proper and only logical construction thereof and as far as we have been able to discover, after diligent search, there is no recorded case where said statutes or similar ones have been brought into play under circumstances calling for the construction contended for by plaintiff in this suit, but, be that as it may, we will discuss the case from plaintiff's view point and under the strained construction therein contended for, namely: That irrespective of all else, any sale of merchandise whether it be large or ever so small, out of the usual or ordinary course of the business or trade of the vendor, comes within the act.

It must be conceded, in view of the testimony of plaintiff's witnesses, that if Mr. Judkis was selling goods at wholesale as well as retail, the transactions between Judkis and Horenstein involved herein, were in the usual or ordinary course of Judkis' business. (Transcript—Judkis—page 23; Ballin—page 30; Boscowitz—page 34; Bamford—page 37; Hammond—page 40.) The only question, therefore, is, was

the vendor Judkis doing a wholesale as well as retail business?

It is conceded that defendant purchased from time to time, during July, August, September and October of 1917 about $1,000.00 worth of merchandise, all of which, except about $180.00 worth, was purchased of Mr. Judkis at wholesale in amounts ranging from about $6.00 to $225. Plaintiff contended that Judkis was doing a retail business only; that the goods having been disposed of at wholesale were sold out of the usual or ordinary course of the business of Judkis and therefore said transactions were within the Bulk Sales Act, despite the fact that the total of said sales neither amounted to a transfer of the entire stock or anywhere near the larger proportion thereof.

Testimony relative to the nature of Judkis' business being as follows:

PLAINTIFF'S WITNESSES.

L. JUDKIS—(A witness for plaintiff, attorneys for plaintiff's statement on page 23 of appellant's brief to the contrary notwithstanding)—testified:

That he had been in business for about 5 years in Portland, Oregon, and during all of said time he did a retail and a little jobbing or wholesale business. (Transcript page 22.) That he sold goods at wholesale from the time he first started in business. (Transcript page 22 and 27), and "That during the time he was in business he sold goods in bulk (meaning wholesale—Transcript page 22-23) to lots of people besides Horenstein. That the goods sold

to defendant were sold in the way he had been doing business. (Transcript page 23.)

JACOB H. BALLIN testified:

That he called at Mr. Judkis' store on various occasions as a salesman and that he was competent to state, from observation, the character of business conducted by Judkis and that Mr. Judkis was "In the Retail Gents' Furnishings and Clothing Line" (Transcript page 29.) He had never purchased goods of Judkis and did not know whether or not Judkis sold goods at wholesale (Transcript page 30). This witness' correctness of observation and how intimately he was acquainted with Mr. Judkis' business is evidenced by the fact that he did not remember Judkis carrying a line of Women's Clothing (Transcript page 31) although Judkis had such a line of merchandise (Transcript pages 24, 53, 55).

ANSELM BOSCOWITZ, who visited Mr. Judkis' place of business, as a salesman, testified:

That Judkis was doing a retail business. He did not know that Judkis had been selling goods at wholesale. That in the rear of the store was a room that Mr. Judkis could use for wholesale purposes. That at times he saw large quantities of merchandise which Mr. Judkis could have jobbed off and which Judkis told him he did job off. That he knew of Mr. Judkis jobbing off some "underwear" and some "Buster Brown Hosiery" (Transcript p. 31-35).

JAMES A. BAMFORD, a salesman, testified:

That he had been selling Judkis goods for

three years and that the business conducted by Judkis was that of a retail store, as far as his knowledge was concerned. That he could not state of his own personal knowledge, whether or not Judkis conducted a wholesale in connection with his retail business. That he could only say that Mr. Judkis' place was equipped as a retail store. He had seen him retail goods and had never seen any jobbing done there. (Transcript pp. 35-36).

WINTHROP HAMMOND, upon being shown a list of the creditors of Judkis stated that it would indicate that Mr. Judkis was doing a retail business (Transcript page 38); that he had no personal knowledge of Judkis and never heard of him or of his business. That it might be possible for a man to carry on a small wholesale business in connection with retail. That from the few names he was familiar with appearing on the said list, he would say that the list did not contain the names of firms that sell to wholesalers. That he was familiar with a dozen names on the list who sell to retail trade, and didn't think they sold to wholesalers, but was not familiar with the rest (Transcript pages 38-40).

DEFENDANT'S WITNESSES.

J. SOLOMON, a merchant in Portland, Oregon, for 29 years, carrying a stock worth between $30,000.00 and $40,000.00, testified:

He had purchased merchandise of Judkis "off and on since he was in business for the last three or four years, from $150, $200 to $300 at a time." (Transcript page 43.) That he bought the goods at wholesale and "that Judkis conducted a wholesale and retail business." "He knew Judkis sold goods to other

merchants at wholesale; that the transactions between himself and Judkis were frequent." That there was nothing unusual in Judkis' selling goods at wholesale or in the sales to defendant. (Transcript page 44.)

LOUIS KRAUSE, a merchant in business in Portland, Oregon, for 21 years, carrying a stock varying, according to the season, from $12,000 to $20,000, testified:

He had known and had business dealings with Judkis for about two years during which time he purchased goods at wholesale of Judkis in various amounts from $150 to $200 at a time, aggregating more than $1,000. "That Judkis was doing a jobbing business, and had a retail store in connection therewith." That there was nothing unusual in the Judkis sales to defendant. (Transcript pp. 47-48.)

MEYER WAX, engaged in the general merchandise business in Portland, Oregon, for 22 years, testified:

That he had known and had business dealings with Judkis for about three years; that some of the goods he purchased were delivered from the Judkis store and some from his warehouse; that "Judkis was engaged in the retail and partly wholesale"; that purchases he made from Judkis were in the usual course of business in lots of about $125. (Transcript pp. 49-50.)

L. ROBINSON, a merchant, engaged in the dry goods and gents furnishing business in Portland, Oregon, for some 22 years, testified:

That he had purchased merchandist from

Judkis for the past 3 or 4 years in quantities from $10 to $30 at a time and "paid wholesale prices for the same." That "Judkis was in the wholesale and retail business" and "that the sale to Horenstein of 36 pairs of shoes was not out of the ordinary course of business." (Transcript, page 51.)

DEFENDANT HORENSTEIN testified:

That he had had business dealings with Judkis for about 4 or 5 years and frequently purchased goods from him at wholesale and retail and said purchases were paid for and were made in the usual course of business. That he purchased goods at wholesale from merchants other than Judkis. (Transcript, page 54.)

M. GLICKMAN, a merchant, conducting a wholesale and retail business with a stock of about $15,000 to $20,000 and who had been in business in Portland, Oregon, for the last 15 years, testified:

That he had known Judkis for 4 or 5 years and that Judkis "used to sell retail, some wholesale, same as we did." (Transcript, page 55.)

M. COHEN, a merchant engaged in the retail and wholesale business in Portland, Oregon, for 10 years, testified:

"That he was acquainted with Mr. Judkis and knew the kind of business that Judkis was conducting. That he bought goods of Judkis at wholesale. Judkis was selling wholesale and retail." (Transcript, page 56.)

The one transaction upon which appellant is laying great stress and around which he is now trying to build his case is the sale of 36 pairs of shoes to Horenstein for invoice price —Judkis losing the freight, claiming said transaction to be so unusual as to put a purchaser upon notice.

The testimony in that regard being as follows, i. e.:

PLAINTIFF'S WITNESSES

BOSCOWITZ, referring to such a sale made by a **retail merchant,** said:

"A. I would state in the matter of the shoe transaction, you put the example before me, providing the jobber or manufacturer didn't give the retailer consent to dispose of the shoes, it would be an unusual transaction." (Trans., p. 32.)

BAMFORD:

Q. Supposing the merchandise shipped did not come up to sample, now, rather than send all those goods back and pay freight, wasn't it just as advisable to sell those goods and eliminate freight?

A. I have known a number of instances like that, in which the matter was referred back to the factory and the factory made an allowance on the goods.

Q. Do you know whether or not there was any allowance made by the factory in this case?

A. I do not. . . . .

(Transcript pages 37-38.)

DEFENDANT'S WITNESSES.

SOLOMON testified that when a man gets too much of one article he is willing to sell an amount of it; that he, himself, makes similar sales, sometimes even selling goods for cost and losing the freight; that other stores did likewise and it was customary so to do. "When I have too much of one kind, or odds and ends, I sell it out at cost or below cost * *." (Transcript, p. 44.)

Q. Mo. Solomon, is it out of the ordinary in a case where Mr. Tieser has just stated Mr. Judkis sold 36 odd pairs of shoes to Mr. Horenstein, and has sold them at cost and lost the freight on them, is there anything unusual about that?

A. Nothing unusual.

Q. Do you know, could you tell what reasons people have, merchants have, for doing that?

A. Well, sometimes goods don't come up to sample; sometimes the man has got too much of one article, he orders from different houses, some of the things he wishes to get rid of, and it will pay him to get rid of, instead of having them on the shelf, to lose the freight on them (Transcript p. 46).

KRAUSE testified that if freight had not been paid upon the goods, but they had been

sold for cost less freight, that would not be unusual, but it is very often done by some merchants when they know they are overstocked—when they may use the money for something else. (Transcript p. 49.)

ROBINSON testified "That a sale to Horenstein of 36 pairs of shoes at cost less freight was not out of the ordinary course of business; that it was usually done every day in the week." (Transcript p. 51.)

GLOCKMAN testified "It was usual to sell merchandise and lose the freight, and many do that and even discount 10 or 15 percent in order to get rid of stock they couldn't use." (Transcript 55.)

Defendant Horenstein sold said shoes at a profit of about $8.00.

Considering this evidence, bearing in mind that the burden was upon the plaintiff, that the court found that Judkis was doing a jobbing or wholesale business as well as a retail business, and the rule that when the court has considered conflicting evidence and made a finding or decree it is presumptively correct and must be permitted to stand unless some obvious error of law or serious mistake of fact has been made, we respectfully submit that the decree of the lower court should be affirmed.

Respectfully submitted,

MORRIS A. GOLDSTEIN,
FREDERICK H. DRAKE,
Attorneys for Appellee.

No. 3322

United States
Circuit Court of Appeals
For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. D. BRANHAM,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

FILED
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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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In the Superior Court of the State of Washington, in and for the County of Whitman.

No. 2981.

A. D. BRANHAM,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, and THE CITY OF PULLMAN, a Municipal Corporation,

Defendants.

Amended Complaint.

Comes now the above-named plaintiff by her attorney, John Salisbury, and amending her complaint,

*Page-number appearing at foot of page of original certified Transcript of Record.

and for cause of action against defendants above named, alleges as follows:

I.

That plaintiff is a single unmarried woman; that the Oregon-Washington Railroad and Navigation Company, defendant above named, is a corporation licensed to do business in the State of Washington; that the above-named City of Pullman, said defendant, is a municipal corporation organized and existing under and by virtue of the laws of the State of Washington, and located in the State of Washington.

II.

That there is located within the corporation limits and boundaries of the said City of Pullman, defendant above named, a certain street designated, named and known as Kamiaken Street, existing and laid out for the use of citizens and the general public of the City of Pullman; that there is on said above-described street a certain bridge beginning at a point south of the tracks or right of way of the first above-named defendant corporation, and running thence within the side-lines of said above-named street across a small stream to a point on said street that intersects the south line of the Northern Pacific right of way which runs east and west across the said street at said point of intersection. [3]

III.

That the said City of Pullman, through its council, on the 2d day of November, 1915, authorized the proper officials and representatives of said City of Pullman to enter into an agreement and contract by

and with the said above-named defendant railroad company, authorizing and agreeing that the said railroad company should proceed to at once place the said above-described bridge in a thorough and proper state of repair; that thereafter the said above defendant railroad company entered upon the performance of said contract for the repair of said bridge, and thereafter on or about the 11th day of May, 1916, the said above-named defendant railroad company presented and rendered to the said City of Pullman a bill for the *pro rata* share of the cost of placing said bridge in repair as per their agreement between the said corporations, which said bill was duly paid by said municipal corporation.

IV.

That during the course of the reconstruction and repair of said bridge by the said above-named defendant railroad company, the said railroad company, through its servants, placed across the north of said bridge at its junction with the south line of the said Northern Pacific right of way, a barricade of planks extending across the said Kamiaken Street at said point, to a point on the east line of said bridge and the sidewalk thereof; that after the said railroad company had partially completed said bridge aforesaid to a sufficient extent as to permit the crossing of said bridge by pedestrians on the sidewalk thereof, the said railroad company, through its servants, and to permit and enable the citizens and general public of the City of Pullman to cross said bridge upon the sidewalk of said bridge, at a point on the east side of the sidewalk running from

said bridge and at the junction of the north end of said bridge with the south line of the Northern Pacific Railroad Company's right of way where the same crosses the said [4] Kamiaken Street at the barricade erected by said company as aforesaid, and at which point the said sidewalk on said bridge was torn up and in an impassable and dangerous condition for pedestrians, the said railroad company, through its servants, negligently and carelessly laid a temporary sidewalk outside of the said barricade above mentioned and across and over the partially excavated portion of the street south of said barricade; the north end of said temporary sidewalk being on the said street east of the east end of said barricade; said planking being approximately 16 or 18 feet long by about 1 foot wide, with spaces in between and without any railing or side protection whatever to prevent or protect pedestrians from falling off of the sidewalk through and into the holes and partially excavated street over which the permanent sidewalk on said bridge was to have been laid, which said negligent, careless and crude condition of said sidewalk was suffered and permitted to be laid by said defendant railroad company by said above-named municipal corporation for a period of several weeks prior to the 4th day of February, 1916, which said defective and improperly laid sidewalk or portion thereof was used during said time and was the only means of passing over said portion of said sidewalk on said street for said period of time by the general public and citizens of the said City of Pullman, up to and including the said 4th day of February, 1916.

That on the said 4th day of February, 1916, the condition of said temporary and defectively laid sidewalk aforesaid was such that the said defendant railroad company and the said defendant City of Pullman had permitted to accumulate upon said planking laid as such temporary and defective sidewalk on said street, quantities of snow and ice, the same having been permitted to accumulate in a rough, uneven, slippery, dangerous and negligent condition upon said planking constituting said sidewalk as aforesaid.

V. [5]

That on the 4th day of February, 1916, after dark on the evening of said date, plaintiff herein while attempting to pass over said above defective and dangerous sidewalk described, carelessly and negligently constructed as aforesaid, and carelessly and negligently maintained and suffered to be maintained by the above-named defendant corporation as aforesaid, when at a point midway between the north end and the south end of said temporary and defectively and negligently constructed and maintained portion of said sidewalk above described, and because of the defectively and negligently constructed and negligently maintained condition of said sidewalk as aforesaid, the plaintiff slipped and fell on and from said sidewalk into one of the excavations still open on the side of said sidewalk and by her fall, because of the negligent construction and defective condition of said sidewalk, plantiff suffered a Pott's fracture of the left ankle joint, which is a fracture of the inner Malleolus with serious injury to the

lower tibial articulations with the rupture of the internal lateral ligament, and plaintiff also suffered a painful injury to her back by straining the muscles and ligaments of the back, also congestion and displacement of the pelvic organs, this causing chronic neurasthenia from which plaintiff suffers constantly; that because of said injuries plaintiff was confined to her home in bed for a period of more than eight weeks and had to have the services of physicians and a nurse, and said injury is a permanent and continuing injury and plaintiff never will fully recover from the effects of said injury, *and because of said injury,* and because of said injury suffered as aforesaid, plaintiff has incurred great pain and suffering, and plaintiff is at this time unable to use her said foot and ankle as effectively as prior to the said injury, and plaintiff is informed and believes that she will never be able to use her foot to the same extent as prior to the said injury.

VI. [6]

That plaintiff's occupation is that of a dressmaker and while working at such occupation it is absolutely necessary and essential, in order to properly conduct her said occupation, that she use the ordinary sewing-machine used in such occupation, and for the running of said sewing-machine it is absolutely necessary and essential that both feet be used in the operation thereof; that because of the injury aforesaid, incurred as aforesaid, plaintiff will be forever incapable of using her foot for such purpose; that prior to said accident and injury plaintiff worked continuously at her said occupation of dressmaker

and earned thereby an average of about $3 per day; that because of said accident and injury to her said limb described as aforesaid, plaintiff will be utterly unable to follow her said occupation as dressmaker, and because of the necessity of employing physicians and nurses, plaintiff has been required to pay large sums of money for such services.

VII.

That thereafter, to wit, within 30 days after the said injuries were received in the manner aforesaid, plaintiff duly filed her notice of claim for her damages because of said injuries received as aforesaid, with the clerk of said defendant municipal corporation.

VIII.

That because of the facts hereinbefore stated, and the injuries heretofore described and set forth, plaintiff has suffered and sustained damages in the total sum of $10,000.

WHEREFORE plaintiff prays judgment against the defendants above named, and each of them, for her damages received because of the negligence of defendants as set forth above, in the sum of $10,000, together with her costs and disbursements by her in this action incurred.

(Signed) JOHN SALISBURY,
Attorney for Plaintiff. [7]

State of Washington,
County of Spokane,—ss.

A. D. Branham, being first duly sworn on oath, deposes and says: That she has read the above and foregoing amended complaint and knows the con-

tents thereof and that the same are true as she verily believes.

(Signed) A. D. BRANHAM.

Subscribed and sworn to before me this 20th day of October, 1917.

(Signed) JOHN SALISBURY,
Notary Public for Washington, Residing at Spokane, Washington.

Service of the within Amended Complaint is hereby acknowledged this 24th day of October, 1917, by receipt of a copy of same.

D. C. DOW,
Attorney for City of Pullman.

Service of the within Amended Complaint is hereby acknowledged this 20th day of October, 1917, by receipt of a copy of same.

HAMBLEN & GILBERT,
Attorneys for O.-W. R. & N. Co.

[Endorsements]: Amended Complaint. Filed in the U. S. District Court for the Eastern District of Washington. May 4, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [8]

[Title of Court and Cause.]

Answer.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, and in answer to the amended complaint of the plaintiff, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph one of said amended complaint.

II.

Admits the allegations contained in paragraph two of said amended complaint.

III.

Admits the allegations contained in paragraph three of said amended complaint.

IV.

Denies each and every allegation, matter and thing alleged in paragraph four of said amended complaint, except that during the course of reconstruction and repair of the bridge referred to in said amended complaint, the defendant railroad company placed a barricade of planks extending across said Kamiaken Street.

V.

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph five of said amended complaint, and therefore denies the same.

VI. [9]

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph six of said amended complaint, and therefore denies the same.

VII.

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph seven of said amended complaint and therefore denies the same.

VIII.

Denies that plaintiff has been damaged in the sum of $10,000 as alleged in paragraph eight of said amended complaint or that she has been damaged in any sum whatsoever by reason of the carelessness or negligence of the defendant or any of its employees.

FIRST AFFIRMATIVE DEFENSE:

For an affirmative defense herein, this defendant alleges:

I.

That on or about the 4th day of February, A. D. 1916, the defendant while engaged in the reconstruction and repair of a certain bridge along Kamiaken Street in the City of Pullman, Wash., properly barricaded the said street against traffic, both vehicle and pedestrian; that on or about said date and notwithstanding the said obstruction referred to, the plaintiff went upon the premises adjoining said bridge and not a part thereof, nor a part of said Kamiaken Street, and after going thereon slipped and fell; that defendant is informed that injuries resulted therefrom, the exact nature of which are unknown to this defendant; that in going upon said premises as aforesaid the said plaintiff was guilty of contributory negligence.

SECOND AFFIRMATIVE DEFENSE:

For a further affirmative defense, this defendant alleges:

I.

That on or about the 4th day of February, 1916, while the defendant was engaged in the reconstruction and repair of a certain [10] bridge over and

along said Kamiaken Street in the City of Pullman, Washington, a heavy snow fell and immediately thereafter the same melted and froze and made the premises in and about the said bridge exceedingly slippery and such condition was fully known to the plaintiff herein, and that while the said premises adjacent to the said bridge were in such condition and notwithstanding the obstruction placed to said bridge, and the premises adjacent thereto, and acting carelessly and negligently, the said plaintiff entered upon the said premises with high-heeled shoes which made any attempt to walk upon said premises exceedingly dangerous and perilous; and that this plaintiff negligently and carelessly after passing said obstruction attempted to walk upon said premises adjacent thereto covered with snow and ice, as aforesaid, with said high-heeled shoes and thereupon and by reason of said slippery condition and said high-heeled shoes worn by plaintiff, said plaintiff fell and sustained injuries, the exact nature and extent of which are unknown to this defendant, and in so doing plaintiff was guilty of contributory negligence.

WHEREFORE, this defendant prays that said action be dismissed and that it have judgment for its costs herein against the plaintiff.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

L. R. Hamblen, being first duly sworn, on oath de-

poses and says, that he is one of the attorneys for the above-named defendant, and makes this verification in its behalf for the reason that none of the officers of said defendant corporation are present within the County of Spokane and capable of making said verification; that he has read the foregoing Answer, knows the contents thereof, [11] and that the same are true as he verily believes.

(Signed) L. R. HAMBLEN.

Subscribed and sworn to before me this 5th day of September, 1918.

[Seal] (Signed) W. S. GILBERT,
Notary Public, Residing at Spokane, Spokane County, Washington.

Service of the within Answer is hereby acknowledged this 6th day of September, 1918.

JOHN SALISBURY,
Attorney for Plaintiff.

[Endorsements]: Answer. Filed September 6, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

[Title of Court and Cause.]

Reply.

Comes now the above-named plaintiff and replying to defendants' first and second affirmative defense set forth in their answer alleges, to wit:

I.

Plaintiff denies each and every allegation set forth in defendants purported 1st affirmative defense as contained in their said answer.

II.

Plaintiff denies each and every allegation set forth in defendant's purported 2d affirmative defense as set forth in their said answer.

(Signed) JOHN SALISBURY,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

A. D. Branham, being first duly sworn on oath, deposes and says that she has read the foregoing reply and that the allegations thereof are true.

(Signed) A. D. BRANHAM.

Subscribed and sworn to before me this 12th day of September, 1918.

[Seal] (Signed) JOHN SALISBURY,
Notary Public for Washington, Residing at Spokane, Washington. **[13]**

Service of the within Reply is hereby acknowledged by receipt of a copy of same this 14th day of September, 1918.

HAMBLEN & GILBERT,
Attorneys for Defendant.

[Endorsements]: Reply. Filed in the U. S. District Court for the Eastern District of Washington. September 21, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[14]**

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled cause, find for

the plaintiff, and assess the amount of her recovery at three thousand seven hundred and fifty dollars ($3,750).

(Signed) J. D. CASEY,
Foreman.

[Endorsements]: Verdict. Filed September 24, 1918. W. H. Hare, Clerk. [15]

[Title of Court and Cause.]

Motion for Judgment Notwithstanding Verdict of the Jury.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and pursuant to stipulation entered into between counsel for the respective parties, with the consent of the Court, and prior to the giving of instructions to the jury by the Court, by which stipulation it was agreed that in event the Court deny the motion of the defendant for a directed verdict the defendant might renew questions raised by such motion and the Court finally pass upon them by motion for judgment notwithstanding the verdict, moves the Court for judgment in favor of the defendant in the above-entitled cause notwithstanding the verdict of the jury returned in said cause in favor of the plaintiff and against the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Service of the within motion for judgment is hereby acknowledged this 26th day of September, 1918.

JOHN SALISBURY,
PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Motion for Judgment notwithstanding Verdict of the Jury. Filed in the U. S. District Court for the Eastern District of Washington, September 26, 1918. W. H. Hare, Clerk. By Harry J. Dunham, Deputy. **[16]**

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and in event the motion of the defendant for judgment notwithstanding the verdict is denied by the Court, moves the Court for a new trial herein for the reasons and upon the grounds, following:

1. Excessive damages appearing to have been given under influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdict of the jury and that it is against the law.

3. Error in law occurring at the trial and excepted to at the time by the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Service of the within Motion for New Trial is hereby acknowledged this 26th day of September, 1918.

JOHN SALISBURY,
PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Motion for New Trial. Filed in the U. S. District Court for the Eastern District of Washington. September 26, 1918. W. H. Hare, Clerk. By Harry J. Dunham, Deputy. **[17]**

[Title of Court and Cause.]

Order Denying Motion for New Trial and Motion for Judgment Non Obstante Veredicto.

This cause coming on for hearing upon the defendant's motion for a new trial, and upon defendant's motion for judgment notwithstanding the verdict of the jury (the latter having been interposed according to stipulation entered into at the time of the submission of the said cause to the jury), and the Court being fully advised in the premises, and having considered said motions, and each of them, and the argument of counsel:

IT IS ORDERED that defendant's motion for a new trial, and the motion for judgment notwithstanding the verdict, be, and each of the same are hereby denied.

Done in open court this 18th day of November, 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Denying Motions for New Trial and Judgment Notwithstanding Verdict. Filed in the U. S. District Court for the Eastern District of Washington. November 18, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [18]

[Title of Court and Cause.]

Judgment.

This cause having heretofore come on for trial before the Court and a jury, and the cause having been submitted to the jury by the Court, and thereafter said jury returned into court their verdict awarding the plaintiff the sum of thirty-seven hundred and fifty dollars ($3750).

Now, therefore, upon the verdict of said jury and the evidence and proceedings in said cause,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, A. D. Branham, do have and recover of and from the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, the sum of thirty-seven hundred and fifty dollars ($3750), and costs to be hereafter taxed.

Done in open court this 25th day of September, A. D. 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed in the U. S. District Court for the Eastern District of Washington. September 25, 1918. W. H. Hare Clerk. [19]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, to wit, on the 21st day of September, 1918, one of the days of the September Term of the United States District Court for the Eastern District of Washington, Northern Division, before Hon. Frank H. Rudkin, Judge of said court, presiding, this cause came on for trial on the pleadings heretofore filed herein.

This was an action at law to recover damages for personal injuries sustained by the plaintiff, alleged to have occurred by said plaintiff falling upon some planks at Pullman, Washington, near a bridge being reconstructed by the defendant, upon the 4th day of February, 1916.

Plaintiff appeared in person and by Messrs. Plummer & Lavin and John Salisbury, her attorneys, and the defendants appeared by Messrs. Hamblen & Gilbert, their attorneys, and a jury being duly empaneled and sworn to try the case, the following proceedings were had and testimony taken.

An opening statement to the jury was made by Mr. Plummer for the plaintiff.

Thereupon the following proceedings were had:

Mr. PLUMMER.—If I understand the pleadings correctly, if your honor please, I think they admit that they were reconstructing this bridge; isn't that correct?

Mr. HAMBLEN.—We admit there was a contract there between [20] the company and the city.

As to the terms of the contract, they are not alleged in the complaint, and of course the terms are not admitted.

Mr. PLUMMER.—No, I do not say they are admitted, but you admit that the company was engaged in rebuilding this bridge under some sort of arrangement.

Mr. HAMBLEN.—Yes. And I explained to Mr. Plummer that if we could not get the original contract, we have a copy here and are willing that he use it now if he wishes to.

Testimony of Mr. Reed, for Plaintiff.

Thereupon Mr. REED, being called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

I reside at Pullman have resided there about twenty-eight years with the exception of a couple years that I was on the Sound. The last fifteen years regularly. Am postmaster there. I am familiar with the streets of Pullman, and the street that Mrs. Branham was walking on. She is my wife's sister in law. I was there at the time this bridge was being constructed on Kamiaken Street, one of the public thoroughfares of Pullman, I suppose travelled more than any other street. I think the traffic is greater across that bridge than any other street in town. The south end of the bridge is just a block from Main Street and there is a street runs into it at the end of that bridge; two streets run into this bridge, one runs across and stops there. In other words, the traffic of two

(Testimony of Mr. Reed.)

streets coming that way have got to cross this bridge. It is right in the business center of Pullman for travel. I recall Mrs. Branham getting injured there on that bridge or on the planking that approaches the bridge. I cannot remember as to dates, but it is probably two weeks or a little longer that the bridge had been in condition it was when she got hurt, I don't remember just exactly, it was some time, and we had quite a bad spell of weather at the time, snowing and thawing. They could not work. I did not see where she fell; I was not there [21] right after she got hurt. I know the condition of the street, is all. I did not see when she fell. I recognize those planks by your description; there was three planks and there wasn't any two of them the same length, as I remember it. They was laying on the left side as you go south; that would be the east side. There was one of them laying a little up on the edge of the other. Those were bridge planks or something. And the other one was laying a little west from that, an inch and a half or two inches or something like that. That is, it was not always that way, of course, as the planks got loose and thawed out like it kind of jumped around. It was on small rock or gravel or loose stuff as would be about a bridge in building that way. There was a crack between two planks. Those planks were supposed to be twelve inches wide, I think, what they call bridge plank. I don't know what else they could be put down for except to walk across, because we could not get

(Testimony of Mr. Reed.)
across without there being something there, the way they had it.

Q. What did these planks extend over, what kind of hole or excavation?

A. Irregular. I would like to explain that bridge was—

Q. I will get at that, Mr. Reed.

A. In tying it up it made an irregular place in there where those planks were put, you see. At that time the defendant company was carrying on the work of reconstructing the bridge. I made a plat which substantially shows the situation there of those planks and the approach of the bridge for you this morning in your office. This just about substantially shows the situation there with reference to the approach, the planks and the bridge and the O. R. & N. track and the Northern Pacific track. This may not be just exactly. I don't think these two come exactly together, but just the angle here. I don't know that that is just right. Just about substantially. The main bridge is on the south side of the **[22]** O. R. & N. track, which is marked O.-W. R. & N. track on this plat. This is the creek. The water runs along there. This is lowland, bottom land from the O. R. & N. track to the place marked "N. P." The two planks that I spoke of are shown on this plat on the northeast corner of the bridge. You may call that an approach, but we call it a bridge. This is what we call the south Palouse. These things marked "plank" here are the three planks testified to. This up here marked

(Testimony of Mr. Reed.)
with an "X" is a sidewalk, and there is a break between the property line here and the sidewalk, but that is a regular property line. "P. L." is the property line, and this is a restaurant marked "Res." Palouse Street comes in here right along the side of the N. P. right of way, marked "P. S." This sidewalk is down to the finished street there. I think that is brick, the way it was then, and a short sidewalk about from here, to connect that on the other side of the railroad track and it was torn up when this bridge was being made; that was torn up and left it there rough and bad, where you have marked the "R." During the three or four weeks while they were repairing that bridge we had to go down here and had to cross here, across the north end and go along here and over to town. That curved line is marked "O. X." The approach, the bridge, the sidewalk and planking and all that I have described here is within the limits of the street, between the property lines; a thirty-five foot bridge and eighty foot street. I passed over this place just before six o'clock going to the office on the same day of the accident. I usually stay at the office until eight. There is mail comes in there, and I had to go back home, and I didn't know anything about the accident until about eight o'clock.

The COURT.—Is there any controversy over the existence of this walk, or the purpose for which it was used?

Mr. HAMBLEN.—There is some difference as to how it was used on this occasion. There is no ques-

(Testimony of Mr. Reed.)

tion but what the walk **[23]** was completed there.

The COURT.—And that it was completed there for the purpose of accommodating the foot-passengers?

Mr. HAMBLEN.—Well, these boards, your Honor, I could not admit that, no. I think that will develop.

Being further examined by Mr. Plummer on behalf of the plaintiff, Mr. Reed testified:

Q. For three weeks previous were there any barriers on the sidewalk, on the south end of the approach across the end of the sidewalk, on the south end of the bridge, during all of the time that you speak of?

A. There was nothing there at any time that I know of that would hold them to go through, but the barrier was across the south end of the driveway, and the openings were left open for foot-passengers just the same as ever.

I would judge from three to five hundred people would pass this place that this lady was suing, and some of them as many as three and four times a day. It is between the city and the college, where everybody goes. At the time I crossed there about eight o'clock that night the ice and snow on there was in pretty bad shape, as far as that is concerned; the snow, and the people walking most always in the same place, it was naturally in kind of a ridge, the same as it would be on a step, or anything of that kind, that made it rough. It was probably two or three inches, or maybe more than that, where it was

(Testimony of Mr. Reed.)

irregular, where they would step more, and a person turned right around on that place, take hold of that railing that they had to walk around, turn there very short, and others would go a little further down, maybe four or five or six feet, some people maybe went down that far, but a great many would hold on that.

Q. How long had that condition existed there that you speak of with reference to the ice and snow? **[24]**

A. Well, it was bad weather all along for the full time. I think I passed there every day, and I did not see any attempt on the part of the company to clean off this ice and snow and make it passable so that there would not be any danger of people slipping. That railing that I spoke of is about sixty feet, I judge, from the O.-W. R. & N. It does not go clear up. It is about thirty feet from where this planking is to the end of the bridge. This plank is about twelve or fourteen or sixteen feet. Originally there was a railing clear up to the point there, when the bridge was first built, but not in the last five years, because this is all filled in now.

(Thereupon said plat made by the witness was marked Plaintiff's Exhibit 1 for identification.)

After Mrs. Branham was hurt she was taken to my house some time in the evening. I don't remember whether she was at the house when I got there or not, and she was there on account of her inability to get away between two and three months, I would judge, and during that time my wife took care of her; she

(Testimony of Mr. Reed.)

could not get about at all.

Thereupon Plaintiff's Exhibit No. 1 was admitted in evidence without objection.

Cross-examination.

Whereupon the witness was cross-examined by Mr. Hamblen and testified as follows:

Q. Now, will you just step down here again and look at this exhibit 1 and show the jury just where this obstruction or barrier that you referred to was placed with reference to the north end of the bridge here?

A. It was right at the edge, the railing across here that would keep people from there was right at the edge, at the end of the sidewalk, and extended clear to the east line of the sidewalk. There was no notice given there on that barrier to warn the people [25] not to cross there that I know of except at night there would be a red light in here, in the middle of the bridge. When they were working there, of course, they did not have it. That was when they quit work. During this period in February they were not working there on account of the conditions of the weather, I suppose. In order to get upon the sidewalk this sidewalk along the east side of the bridge was, I think, completed right up to the right of way or very close to the right of way of the Northern Pacific at this time in February. It was not completed until some time after the bridge was made, but at this time it was completed. The sidewalk was completed right up to the end of the bridge and the right of way of the Northern Pacific. It was com-

(Testimony of Mr. Reed.)

pleted, it was in the same condition that it is now in, the sidewalk, I think. I am quite sure there were three planks. They were put there when they stopped work. The night they stopped work or the evening they stopped work they were put there. I don't know when that was; it must have been in December; maybe not until in January. I do not know whether these planks were put there at the instance of the city or by the company. This place where the planks were placed was not a part of the bridge, but looked like part of the lumber that they were using there. They were what they call bridge plank, three by twelve, and they were not the same length, twelve to sixteen feet. There was just the one length along there, just the one length of plank. It came out to about the corner of the bridge on the sidewalk, and this ground was a little irregular. It had been in very nice shape, but after they took those boards away and the old bridge away, it fell down and caved in further than the sidewalk was built, and it left holes in there where those planks were put, I suppose so that they could cover up those holes so that people could get through. It would have been complete, I suppose, if they had been packed down or fixed so that they could not move, but you know how lumber will tumble about when people will walk [26] on them. These were not packed down. Of course they moved the way people travelled. When it was frozen hard, of course they probably would not move, but as soon as they would thaw, in people travelling there, many people, they

(Testimony of Mr. Reed.)

are bound to move around. I think it was frozen hard at this time, though. I would not be certain about it, and had been off and on for some time. You see the weather is not always frost here. I own this property here marked "Res." It was used for a restaurant at that time and had been for some time prior thereto, known as the Miller Restaurant, and I still own that. I don't know as I just know the date when this plank was put down, but it was put down when they quit the work that night. They were working there from time to time, and would leave it, just as anybody would leave work, and go back the next morning or the next day as soon as they could. I did not make any complaint to the company about the way those planks were put there. I supposed it was the city and left it with the marshal, and he was street commissioner also, and the mayor, and Mr. Duffy, one of the councilmen, and spoke to them about that being a very dangerous place, and should be looked after, and the marshal after the accident happened took an axe and cut that ice that gathers from time to time, cut it off, was the first work he had ever done to it. I told them that after the accident happened. The city did not do anything, but I saw Mr. Wagner did, he and his men would go and chop the ice the next day after the accident. Mr. Wagner was the marshal and also what I think they call the commissioner at the time of the accident. I had made complaint to him before that it was bad. I had not made any complaint to him as to the condition the planks were in, not particularly

(Testimony of Mr. Reed.)

the planks, any more than the condition the street was in by passing over it, because I had to pass over it several times in the day and night, and I was afraid of it, is all. The snow and ice had been permitted to accumulate on the walk along there, on the bridge as well as on this [27] planking. I don't know that it was shovelled off of that sidewalk at all. But it was open all of that time for the use of the public, and the public used it. That was the only way they could get there without going—I don't know it is several hundred feet across the other bridge away down, there is another crossing. Prior to that time I had not asked any representative of the city to open up that crossing so that people could pass there. The same condition existed here that did there, exactly.

Q. That is, it existed all the way on the sidewalk across the bridge?

A. Well, no, this place where the sidewalk had been taken up here, on the north side of the right of way. This bridge approach now runs, if you will measure it, a little up on the Northern Pacific right of way to-day. It is built out just a little on to the right of way, and it is not probably three or four feet—I am pretty well familiar with that land along there because I own a little property along up here in different places, and I had occasion to survey it at different times. I live up the street there a ways, the second block.

Q. And that slippery and icy condition that you

(Testimony of Mr. Reed.)

referred to existed some way north of the point in question?

A. No, this is about three or four feet, I am speaking about this railing across the end, probably two feet up on the Northern Pacific right of way. But the people travelled all the way from that point to five or six feet below that. You know how it would be, people would walk down further than others. You would see the school boys jumping down there in all sorts of ways. Even when the bridge had nothing but stringers across it, the people would come across there in some way.

Q. Then there wasn't any well defined path along this rail around by these planks?

A. Nothing only that. You see they had to cross the [28] railroad here. The railroad had planks in between, as they always have, and this place here, from Palouse Street, or rather from the railroad track to the bridge, was not broken up here like it is there, you understand. I mean by "here" between the walk or the trail that they would go. Don't you see how that is marked now. Well, now, this was not broken up like that, because there was no occasion for it. That was comparitively smooth and people could walk there. But here, where it interfered with it in building a bridge, or along here, as far as that was concerned, was torn up, along the north end of the bridge.

Q. Now, Mr. Reed, you have made a pretty circuitous route here. As a matter of fact, if that barrier came merely to the east line of that sidewalk it

(Testimony of Mr. Reed.)

was not necessary to go clear out the way you have indicated on this exhibit 1, was it?

Mr. PLUMMER.—He said it was substantially correct, but not exactly.

Mr. HAMBLEN.—Well, it makes quite a difference.

Q. As a matter of fact, this second line which you have drawn, and which I am now making blacker, and we will mark it "O. X. O." that is about the route that they would take coming down here, wouldn't they?

A. Yes, sir. In other words, just skirt the north barrier and come back on to the sidewalk. I never had Mrs. Branham point out to me the point where she fell. I heard her say that it was below this place here. From this north end of the bridge here along the sidewalk and along these planks it was practically all the same with reference to being covered with snow and ice. The snow would melt and there was no effort made to keep it clean, only occasionally that I know of, except I suppose it is the city's business to keep the sidewalks there looked after, and that is why I complained to the city. Mrs. Branham was taken to my house after the accident, and it must have been something after [29] eight, probably eight or eight thirty that I first saw her after the accident. I go home at eight o'clock. I think she had only been living at my house a few days at the time of the accident. She had come up from Oregon, from Portland, and her daugther was staying at our place, and I think Mrs. Branham was aiming to

(Testimony of Mr. Reed.)

go back in two or three days, and she probably was there ten days or two weeks. I think she had only been there for a few days at this time. I did not talk with her at that time about bringing a suit to recover damages for her injury. She just talked with different ones for some time before she made any complaint. I talked with her some time after the accident about bringing a suit, I could not tell; it was not immediately after, or anything like that.

Q. Did you go and see her attorney, Mr. Matthews, then and talk with him about it?

Mr. PLUMMER.—I think I shall object to that. I don't know anything about whether she had an attorney. He had a right to see an attorney if he wanted to.

Mr. HAMBLEN.—I wanted to show his interest.

The COURT.—It will show his interest in it, and so you may proceed.

A. Why, I don't remember whether I talked to him about it at that time, or not. I did talk with him about it, yes, sir. I went down there several times and made some measurements. I cannot remember now who I went with, but I don't know but what Mr. Matthews was with me one time. I made several—I went several times. I made one measurement just before I came up here this time, that is, stepped it.

Q. And who else did you go with besides Mr. Matthews at that time?

A. I don't remember—so many people.

Q. In regard to the barriers at the south end of

(Testimony of Mr. Reed.)

the [30] bridge, you say as a positive fact that the barrier did not extend across the sidewalk on the south end of the bridge?

A. No, sir, there wasn't anything across the sidewalk that I ever seen, but there was across the bridge, the main bridge. It was across the roadway of the bridge. It was across the sidewalk on the other side, the other side of the south end.

Q. Had the city removed it from across the sidewalk on the south end?

A. I don't remember of it being in there, because they travelled it all the time. It was just the same as any other sidewalk.

Redirect Examination.

Whereupon, upon redirect examination by Mr. Plummer, he further testified:

Q. Mr. Reed, you spoke about the company having stopped work just before this accident occurred. You used the words "stopped work." What do you mean by that? That they suspended temporarily or somebody had got through with the whole job?

A. They quit work.

The COURT.—Laid off on account of the inclemency of the weather, I understood.

Mr. PLUMMER.—That is what I understood. I wanted to know whether the jury understood that or not.

A. That is what I supposed, on account of the weather. And at that time the bridge had not been completed. These planks were laid down where the company had been working before that. I do not

(Testimony of Mr. Reed.)
know how long after that that the bridge was completed and taken over by the city. It was some time. The bridge was—

Mr. HAMBLEN.—I object to that. The record, I think, would be the best evidence of that.

Mr. PLUMMER.—It is not of sufficient importance to get all the city records up here. I did not suppose there would be [31] any dispute about it. It was afterwards, though, wasn't it?

The COURT.—It was some time after the accident?

Mr. PLUMMER.—It was after the accident that the city took it over?

A. Yes.

Mr. HAMBLEN.—If the Court please, that is somewhat leading.

The COURT.—Oh, is there any dispute over it?

Mr. HAMBLEN.—Yes, if your Honor please, we contend that the city at this time, if the public were permitted to use the sidewalk, it was done by permission of the city and not the company, and whether or not they took it over would not be material, in view of the facts in the case.

Mr. PLUMMER.—You had charge of it during that construction.

The COURT.—Well, counsel rather had reference to whether the work was completed, I presume.

Mr. PLUMMER.—Yes, that was all.

Testimony of Hollis Pinkley, for Plaintiff.

Thereupon HOLLIS PINKLEY was called as a witness in behalf of the plaintiff, and being first duly sworn and examined by Mr. Plummer, testified as follows:

I reside at Pullman, and resided there at the time this lady got hurt; helped pick her up; was crossing at the time, going north. I was going from town and was using this same path or foot bridge that she was using. To the best of my recollection there was two planks laid parallel with the bridge, and the snow had become packed on top of these planks and rounding off a little bit. There was some space between the planks, not very much. I did not see her fall. I was walking right behind Mr. Price at the time, and I saw her on the ground and helped to pick her up. She appeared to [32] be in pain. I heard the description given by Mr. Reed as to the condition of this plank. As far as the technical part of his description is concerned I would not say. I walked over that, but there is a lot of things I could not say. As far as I can recollect now that would be it generally. I would hate to say how long that had been used by pedestrians, it is about three years ago, but it was several days I know. I think it was in substantially the same condition when this accident occurred as it had been for two or three days anyway. I would not go further than that, because it was snowing.

(Testimony of Hollis Pinkley.)

Cross-examination.

Whereupon the witness was cross-examined by Mr. Hamblen and further testified:

My best recollection is that there were only two boards there. I have travelled it from four to six times a day, lived up in the north part of town on College Hill. There was a barrier across the right of way at the north end of the bridge, and the top rail of that barrier—I believe there was one rail, if I remember right, extended from the sidewalk.

Q. And how did pedestrians get up on the sidewalk on the bridge past that barrier?

A. Well, I know how I did. I swung around the barrier on the end.

Q. Just step down here to the front of the jury and show—

Mr. PLUMMER.—There is no dispute about that, Mr. Hamblen. They all walked around the barrier.

A. I saw this exhibit 1 before up in Mr. Plummer's office, possibly the barrier extended to the east line of the sidewalk here, I would not say. I would say that it did not go clear to the line. I would say that it stopped within about a foot of the line. Now that is my opinion. It stopped within a foot of the east line at this point marked "Y," about there. In coming down from the north [33] going southerly along there and swinging around this barrier I do not believe it was necessary to get off of the sidewalk at all before reaching these planks. You would swing on to those boards. I would not say whether those boards were right up to the end of

(Testimony of Hollis Pinkley.)

the bridge or down here. That has been some little time ago, and I have really forgotten all about it. You see in here on the right of way there was two walks in there side by side, if I remember right, and they have changed the right of way a little bit; that is, on the right of way, and the railing would be on the walk if it was swung out here before you approach the barrier.

Q. But in swinging around that barrier there you would have to go up on these planks to get on the sidewalk on the bridge?

A. Well, I know you had to get on the planks. Yes, I have walked on them. I would not say as to where those began and where they left off.

I helped pick up Mrs. Branham, if I remember right, within two or three feet of the barrier, south of the barrier, and I was just to the track when I saw her. She was down at that time. The sidewalk proper at that time, outside of the planks, had snow packed on it, the walk did. It had been snowing, and there was hard snow on there. There was a well-defined trail through there, a path there, because there was a good many people travelling there. That trail ran across these boards. I had to walk on those boards, I know. I picked her up there within two or three feet of the barrier; she was south of the barrier.

Mr. HAMBLEN.—She says in her statement that it was about thirty feet.

Mr. PLUMMER.—We object to comparisons.

The COURT.—I will sustain the objection.

(Testimony of Hollis Pinkley.)

A. Those boards were rather heavy boards and they were practically as close together as you would lay a couple of boards. I don't think there was room for a foot to go between. **[34]**

Q. Was the snow any more uneven on these planks than it was on the sidewalk there?

A. Well, the boards ran parallel with the walk, and it was rounded up on the board possibly more than on the walk. I would not say how long it had been in that condition.

I would say that the snow and ice had been in that condition three or four days. At the time I picked her up it was betweeen five-thirty and six o'clock, and I would not say it was dark. I could see.

Q. And you could see plainly?

A. I could see, yes. I did not see her until after I had crossed the track. I was behind Mr. Price. I just stepped around. I don't know whether I stepped behind Mr. Price or what. There was nothing said by Mrs. Branham when she fell there that I recollect of.

Q. You helped her up and she walked off unassisted?

A. No, I offered to assist her, and she limped across the bridge. I never made any measurement there with Mr. Reed. I made some with Mr. Matthews, who was the attorney for Mrs. Branham, I presume, but I have forgotten that. I cannot indicate where she fell.

Q. When you picked Mrs. Branham up, when you

(Testimony of Hollis Pinkley.)

assisted in picking her up, was there any indication that her foot had gone through any hole, or anything of that kind?

Mr. PLUMMER.—I don't think the form of the question is proper, was there any indication. He may ask here whether she saw any indications.

The COURT.—You may state whether there was a hole there, or anything of the kind, if he observed any.

A. No, I did not observe any.

Q. Will you say, Mr. Pinkley—can you say whether or not there was any hole big enough for her foot to slip through?

Mr. PLUMMER.—We object to that. He went and picked her [35] up, and I do not think he can say, unless he made a thorough inspection of it.

The COURT.—I think he has answered the question once or twice. He may answer it again, however.

A. No, not to my knowledge there was not a hole big enough to get her foot in. She walked off unassisted after I picked her up. She held the railing.

Redirect Examination.

Thereupon, upon redirect examination by Mr. Plummer he further testified:

When I saw that she had fallen I thought she was hurt and went to pick her up.

Q. And did not make any inspection or any critical inspection of the hole between the planks, did you; there might have been a hole that she went through or anything of the kind?

(Testimony of Hollis Pinkley.)

A. No, my knowledge, when I made that answer was in walking across the bridge. I had in mind to help her, and never thought of a damage suit.

Testimony of Mrs. A. D. Branham, in Her Own Behalf.

Thereupon Mrs. A. D. BRANHAM, the plaintiff, was called as a witness in her own behalf, and being first duly sworn and examined by Mr. Plummer, testified as follows:

I am the plaintiff in this case and have been living in Portland. I received an accident on the 4th of February, 1916. Was engaged in the business of dressmaking at that time and have been engaged in that business for over five years. My husband and I were divorced some years ago and this is my daughter here. I had not been living in Pullman before I got hurt for almost two years. Before that I had lived there for several years. Mr. Reed is my brother-in-law. I have been away just a few days before this accident occurred, to Portland, and when I came back to Pullman I **[36]** stayed at Mr. Reed's. This time that I was injured, it had been four or five days before that since I had been down town, or since the snow, across this plank or along this street. I had not been down there at all during the time that the reconstruction of this bridge was going on before the time that I got hurt, that I remember of. When I was there, though, two years before, and living there during those years, I walked across the old bridge and this street quite

(Testimony of Mrs. A. D. Branham.)

frequently. It was just a few minutes of six, and I wanted to do some shopping before the stores closed, so I started down town, and I passed this obstruction of planks that was laid across the bridge. And there was just a narrow path to walk in, I was following the path as near as I could; it was dark; and after I had swung around the end of the boards and walked four or five steps my foot seemed to slip into a hole of some kind, or crack. I had the impression that my foot was going through the bridge, and I fell, and broke my ankle and also hurt my back. Broke the bones of my foot, too, the left ankle. In walking on the plank, when I felt my foot go out from under me or slip, or whatever it was my body went over to the left and my foot felt as if it was in a hole in the crack. When I fell I pulled my foot out. When I started to walk across there there was nothing to indicate at that time that there was any crack between the boards or any hole to fall into. There was snow, lumps of snow on this planking to obscure any crack that might be in the board. The path seemed to be lumpy. When my foot slipped on this lumpy ice and packed snow, that is when I went down there.

Q. And pushed the snow down with you with your foot? A. Yes.

Mr. HAMBLEN.—I object to counsel leading the witness.

The COURT.—Sustain the objection, it is leading.

The WITNESS.—Assuming that this is a barrier across the north end of the bridge and this is where

(Testimony of Mrs. A. D. Branham.)
the people and I went [37] around, and these are the planking here, I presume I had taken three or four steps on to this planking when I fell. Before I fell, or nearly before I fell, I could tell how rough or uneven the snow and ice was. The path seemed to be lumpy and slick, but after I had passed the boards and swung around the boards I thought I was past the dangerous place, but I could not see that before I got to it. After I was picked up and assisted to my feet, I started toward town and walked down on the bridge a few steps on the bridge, but I was sick, sick in my stomach, had to rest several times. I finally met my daughter and she helped me back to the store. I recall Mr. Pinkley assisting me for a few steps. I insisted on them going on. I felt kind of sick on my stomach, and I didn't know that I was hurt as bad as I was. My limb felt numb when I started to walk, and I didn't know that my foot was broken. I went to the store and then called for a taxi. I was laid up at the residence of my brother-in-law, Mr. Reed, about three months, and during that time suffered a great deal of pain from that ankle, very bad pain. I did not sleep very much, with my ankle and my back. It was impossible to lie in bed very long or stay up either, so I was up and down and did not get very much rest. My back pained me; it felt like a strain; it pains yet at times, and this happened in 1916. At the time that I fell that is when I received this pain in the back that I speak of. I never was bothered with it before. I seemed to be

(Testimony of Mrs. A. D. Branham.)

hurt all over when I fell. Dr. Pattee treated my ankle during the time that I was laid up these several months, Dr. Pattee of Pullman. He called on me quite frequently and administered a treatment and Dr. Kinzey assisted him some. That is the only way I have of making a living, from my dressmaking. I am not able to carry on that business since the accident on account of my back and my ankle. If I run the machine three or four days, then I am laid up for a day or two. I have never felt real well since. I was perfectly healthy before this time. [38] Mr. Matthews, the attorney in Pullman, called at Mr. Reed's house just two or three days or three or four days after I was hurt, with a friend of Mr. Reed's, a Mr. Buzby. They came in to make a friendly call, and while he was there he told me that he had spoken to his wife a few days before, I think, about the dangerous condition of the walk.

Mr. HAMBLEN.—If the Court please, I think we are getting quite a ways from the issues.

The COURT.—Sustain the objection.

The WITNESS.—Mr. Matthews was afterwards appointed city attorney, after he talked with me. When this suit was first brought it was brought against the city and the company, and afterwards the city was dismissed.

Cross-examination.

Thereupon the witness was cross-examined by Mr. Hamblen and further testified:

I had not been to Pullman for several months

(Testimony of Mrs. A. D. Branham.)
prior to the time I was there just before this accident; I had been in Seattle and Portland; Portland most of the time, and most of that time was doing dressmaking in Portland; and prior to that time I had been living in Pullman; it had been quite a while before that time that I lived there, four or five years before that time. I don't think I have lived in Pullman, that is made it my home, since about 1909 or 1910, but I was there for several years prior to that time. Prior to this accident I was employed as a dressmaker, and that was the only source of my income. I left Portland on the 29th of January, and the accident happened on the 4th of February. I guess it must have been the O. R. & N. train that I came in on, and I went up to Mr. Reed's house from the train. I think I went up in a taxi, if I remember right. Mr. Reed lives several blocks from the O.-W. station, I don't know just how far it was. I cannot remember that I had been over this bridge between the time I arrived **[39]** there and the time this accident happened. I don't think I was, not over that part of the bridge. I don't think I was, I cannot remember it. If I had gone to town, that is, if I did not ride in a taxi, I would have passed over this bridge. I am quite sure I had not been down town before this.

Q. Had you discussed the condition of the bridge at all with anyone?

A. Why, I had heard Mr. Reed—

Mr. PLUMMER.—You mean before the accident?

Mr. HAMBLEN.—Before the accident.

(Testimony of Mrs. A. D. Branham.)

A. I had heard Mr. Reed remark about the condition of the walks.

Q. As to being dangerous and slippery?

A. No, I did not hear him say anything about that. I don't just remember what he did say, something about the snow being piled up. I heard a conversation between him and my daughter, I don't remember just what it was, but I do remember that he spoke of it as being in bad order, but I don't remember whether it was before I was hurt or after. It might have been after I was hurt, and it might have been before, I don't know; I don't remember.

I did observe that the condition there was lumpy, slippery and snowy as I was approaching the bridge. I remember having to catch hold of those planks as I went past them. It was not so very cold then. The ground was not so very much frozen, I don't think. It was slick. It was slippery and icy on the walk and on the boards, and I could feel the condition as I walked. I could not see, because it was dark. It was dark, I could not see. I could not see the condition of the snow and ice there. I could not exactly see the condition, no; I knew by walking that it was slippery. No, I did not have to feel my way along. I knew it was slippery and lumpy there, but I could not see it, and I never had been over it before. I did not have these same shoes on that night [40] that I am wearing now; did not have shoes very much like these. I don't know where the shoes are that I had that night, they were worn out and I suppose

(Testimony of Mrs. A. D. Branham.)
they were burned up. I suppose they have been burned up, I don't know. I left them with my sister-in-law; they may be there, I don't know. I haven't them here in court. Mr. Matthews made a claim to the city of Pullman and I signed the claim. This is my signature to the claim, marked Defendant's Exhibit 2 for identification, and I swore to it and that is my signature to the verification, and this claim was made by me as the basis of the injuries that I am now claiming, related to the same injury. This related to the same injuries that I am now suing this company for. I guess it was signed on this same date that is given here, on the 3d day of March, 1916, the date I swore to it.

Q. And I want to ask you, Mrs. Branham, whether or not you did not claim in this paper filed, that this accident was due to the slippery condition of the walk and not to any hole or anything of that kind in connection with the boards?

Mr. PLUMMER.—We object.

The COURT.—The claim speaks for itself. Sustain the objection.

Mr. HAMBLEN.—Q. I will ask you, Mrs. Branham, whether as a matter of fact, the cause of this accident was not the slippery condition of the walk, in your—

A. No. It was because my foot slipped into a hole, or something of that sort, or crack, I could not just exactly describe it. I presume it must have been a hole in the boards, because I was walking on the boards, or where the boards should have been.

(Testimony of Mrs. A. D. Branham.)

I did not examine it to see. I did not make a thorough examination, but I know my foot slipped in a hole. I never examined it afterwards. Yes, I can say at this time there was actually a hole there in those boards; there was a hole that my foot slipped into of some **[41]** kind. It might have been due to the ridging up of the snow and ice on the planks; it might have been a couple of ridges. I have not done very much dressmaking since I was hurt; I have done some. I have done some recently; I do a little, what I can; I do it in my rooms. I am now living in Spokane, and have been living here about two months—no, about six weeks, I think. I am living in the Allen Apartments and do general sewing, and have been doing it during those two months, and did what I could some time prior to that. I haven't a sewing-machine at those apartments now; I expect to have; I have only been there about a week. Since this accident happened I have not attended dances; I have gone to look on occasionally. I might have danced for a little, just maybe—I used to be fond of dancing, but I am not in the habit. I may have danced since this accident happened a few times, once or twice, but I have not made a practice of going to dances to dance. I have not really danced, I walked around to music, if that is what you call dancing. What I call dancing is simply walking to the music now, that is all you do now. I have walked to music at places where others were dancing, not very much, about three times since I was hurt, in Pullman; no

(Testimony of Mrs. A. D. Branham.)

place else. I did not go to the three different dances in Pullman since I was hurt to dance, I just dropped in to call. Yes, I was there, danced once at a lodge dance and walked around once or twice. No, sir, not more than once or twice; no place else only Pullman. I remember the occasion of a celebration on the 5th of July, 1917, at Pullman, and remember the dance at the rink there, and remember being present there that night. I tried to dance there that night but the place was crowded. I think I went around the hall once. I do not remember dancing with Mr. Rodeen, and do not remember dancing with Mr. Wright. I only danced around the hall once, I think. I don't remember who that was with; it might have been Mr. Wright, I am not sure about it.

Redirect Examination. **[42]**

Whereupon, upon redirect examination by Mr. Plummer, she further testified:

This fellow Wright that he speaks of might have been a spotter for the O. R. & N.; he asked me to dance. If I recall he is the operator at the Albion depot. The present system of dancing is just walking, just simply walking. I can dance to a waltz to slow music, too. I do not pretend now that I cannot walk. I could not tell how far my foot went down through this plank; it only—it went far enough so that it gave a twist. I felt the sides of my ankle against something when I twisted it and dropped over.

Q. At the time you filed a claim with the city,

(Testimony of Mrs. A. D. Branham.)
which you claim was on account of the same injuries which you are now suing the O.-W. R. & N. for, state whether or not at that time you knew who was legally liable for this condition?

A. No, sir, I did not.

Mr. HAMBLEN.—I object to that.

The COURT.—No inference can be drawn on that account. It is utterly immaterial. They might both be responsible as far as that is concerned.

Mr. PLUMMER.—Q. What was your age, Mrs. Branham, at the time of this accident?

A. Forty-one.

Testimony of Wilma Branham, for Plaintiff.

Thereupon WILMA BRANHAM was called as a witness in behalf of the plaintiff, being first duly sworn, was examined by Mr. Plummer, and testified as follows:

I am the daughter of Mrs. Branham, the plaintiff here. Was with her while she was at Pullman after she was hurt all the time. She suffered from this accident about as much as anyone could suffer apparently; she groaned. She would moan at night and was not able to sleep. She was not apparently able to do much by way of **[43]** labor for several months.

Cross-examination.

Whereupon the witness was cross-examined by Mr. Hamblen, and further testified:

During that period I was in Pullman working in a store, the Bon Ton, and my mother and I stayed

(Testimony of Wilma Branham.)

at Mr. Reed's. I don't know how long my mother was there, several months. I was there all the time she was there. I went to school here a year ago last winter, I went to school here, and my mother was here at that time; we stayed at the Ridpath, she and I, stayed there about seven or eight months, I believe. I came up, I think, in the month of November. She was here about two months before I was, and we were here all winter, up until summer.

Testimony of Mrs. A. D. Branham, in Her Own Behalf (Recalled).

Mrs. A. D. BRANHAM, recalled as a witness in her own behalf, testified on direct examination by Mr. Plummer as follows:

I consulted physicians in the city here with reference to the condition of my back, consulted Dr. Hanson first and he recommended electric treatments and I went to Dr. C. Hale Kimble and he treated me about five or six months. I have not been able to wear a shoe, a high-topped shoe since my ankle was hurt. I had one pair that Dr. Eikenbary, a foot specialist here, picked out for me at the Walkover Shoe Store and only wore them but a short time, and I put an a high shoe and laced it up over my foot and ankle, which causes a pain, and I had to change my shoes three or four times a day, and I find by wearing a small slipper it is more comfortable. I get this pain in my ankle where it was broken any time that I walk too much and when

(Testimony of Mrs. A. D. Branham.)

I run the machine. I can walk some, though, without causing me any pain.

Cross-examination.

Thereupon, on cross-examination by Mr. Hamblen, she further testified: **[44]**

I don't remember the exact date when I first made any claim against the O.-W. R. & N. Company for this injury; it was some time in October, 1916, and at that time I lived at the Ridpath. I do not remember at that time that Mr. McDonald at the claim department of the company called on me at the Ridpath. There was a party called on me, but I don't remember his name. The gentleman you indicate there resembles the man who called on me, and I think he did talk with me about the injury. At that time he prepared a statement in writing and I read it and signed it. This might be my signature on the papers marked Defendant's Exhibit 3 for identification that you hand me. I don't know whether that is the paper I signed or not. I could not swear that that is my signature. I signed a short statement. I won't say that this looks like it. I won't say that it is or I won't say that it is not my signature. It looks like my signature, all except that "A," that "Alice" does not look quite right. The rest of it looks like it—like my signature. I remember signing a short statement, but I don't remember whether there were two pages of it.

Q. Will you read it over and say whether or not that is the statement that you signed at that time?

(Testimony of Mrs. A. D. Branham.)

A. I don't believe I ever signed a statement like that.

Q. You have looked it over carefully and read it all through?

Mr. PLUMMER.—She has answered the question. There is no use arguing with her.

Mr. HAMBLEN.—I am not arguing with her, but I am going to show that this was the paper that she signed.

Mr. PLUMMER.—You may show it. I object to counsel saying that he is going to show it as an attempt to intimidate the witness. He may get his claim agent to swear to it, but that would not be showing it.

A. It seems to me that he asked me questions and was [45] writing at the same time. And here he says the boards were six or eight inches apart. I did not make any statement like that. He asked me questions and wrote them down at the same time.

The COURT.—The only question is whether you signed the statement. State whether or not you did, if you know?

A. I don't think I ever signed a two page statement. I don't think I signed this statement. I was not given a copy of the paper that I signed.

Mr. PLUMMER.—I will offer in evidence the deposition of Dr. E. T. Pattee, taken under stipulation.

Deposition of Eliphalet T. Pattee, for Plaintiff.

I am a physician and surgeon practicing at Pullman, Washington, and have been practicing there on or about or just prior to February 4th, 1916, and since that time. I have a State license to practice medicine, took my examination here and I am still practicing here. The accident happened February 4th, 1916, on the evening of February 4th, and I was called by Mrs. Branham—she didn't think it was a fracture at first, at the time she thought it was a mere sprain or strain and I was called on February 5th, the next morning, and I went immediately and found that it was a fracture, with crepitus, and I made an examination there and also called in Dr. Kenzie, L. G. Kenzie, in consultation. At that time floriscopically it shows a fracture, a Potts fracture as we call it, to the internal malleous of the left ankle joint. The fracture was reduced and was put in a plaster paris cast. A Potts fracture is a fracture of the internal malleous, or of the astragulus, or it may be of both bones, the tibia and the fibula. In this instance it was the internal malleous, the tibia and fibula form the archway something like that (indicating), and the astragulus malleous pushes in there (indicating). The astragulus is one of the bones of the ankle joint (indicating on exhibit "A"). And then when she slipped she must have put her foot that way (indicating). It was [46] broken to the left, out that way, so she must have swung her foot that way (indicating). This diagram would show it (indicating exhibit "A"). This shows that.

(Deposition of Eliphalet T. Pattee.)
This is the diagram I just made. This is the fibula and the pieces of the fibula and the tibia, that is just a narrow bone, and this forms the archway like that, and then the astragulus comes up in there (indicating). That shows the fracture of that bone there (indicating). I can make a little diagram of that showing the break, but I am not much at drawing. This forms the internal malleous and this forms the external malleous (indicating on exhibit "A"). (Witness draws a line on Exhibit "A" showing the break.) The astragulus acted as a wedge. There were two broken.

Q. From what direction, left or right, would the patient have fallen to have caused that fracture if it was caused by a fall?

Mr. GILBERT.—I object to it as incompetent, irrelevant and immaterial and not a proper matter for opinion evidence.

The COURT.—He may answer.

A. The astragulus acts as a wedge. As I understand, she caught her heel and at the same time slipped upon the ice. These things can all be worked out mechanically, she gets the power, the *eight* or pressure with her fall, in that way the weight of the body, which acted as the power, and the astragulus was the fulcrum and it was rammed up into the joint which caused the fracture, which causes a Potts fracture.

Q. Then from your observation of the nature of the break or the fracture the foot would have been held, it must have been held or caught?

(Deposition of Eliphalet T. Pattee.)

Mr. GILBERT.—I object to it on the ground it is incompetent, irrelevant and immaterial and not a proper matter for opinion evidence.

The COURT.—The question is very leading, but he may answer. [47] A. Yes, sir.

Q. And the weight of the body going over on the limb caused the fracture?

Mr. GILBERT.—The same objection.

The COURT.—He may answer.

A. Yes, sir.

Q. Now, just kindly state carefully and state clearly, doctor, in your own way, from your observation of the injury and the fracture, how the break or the fractures were brought about?

Mr. GILBERT.—I object to it as incompetent, irrelevant and immaterial and not a proper subject of opinion testimony from this witness.

The COURT.—The answer may go in.

A. In answering that I would say that it was due—to receive a Potts fracture there has to be an over-riding or an overstepping, a lateral over-pressure of the ankle joint, which is caused either by a misstep, slipping upon a slippery pavement of any kind, or ice, or something in that way; many times in going downstairs. I have had three cases this summer—any misstep on a downward step, a misstep or slipping on a slippery pavement or anything in that way would cause those injuries. If the limb or the foot should be held by some means and the patient fell, it can be done in that way. It can be just simply by slipping—I slipped on a banana peel and my foot

(Deposition of Eliphalet T. Pattee.)

went in that way (indicating) but I just happened to catch myself. If it goes too far that way (indicating) you will lose your equilibrium and you will fall and the astragulus pushes up, and the power breaks off those two bones (indicating). I was in *attendant* upon Mrs. Branham from February 5th, 1916, until April 3d, 1916. If this patient's business or occupation had been that of a dressmaker, where she had to use that foot constantly on a sewing machine or something of that kind, that would impair her capacity, it would incapacitate her in gaining a livelihood because you cannot immobilize any joint without getting [48] some irritation upon use and also some stiffness, to immobilize any joint will cause stiffness, or an ankylosis. As I told her at the time, she would have trouble with it for a couple of years possibly, before that straightened, totally straightened out, as many times it will run over a period of two or three or five years and they will have a weak joint there and have to watch it. In a woman of her age and the occupation that she follows it would inhibit her from that source of livelihood for, I think conservatively, I could say for two or three years, as she follows the work of millinery and dressmaking. At that time she complained of her back terribly. In the wrench which she gave herself naturally she wrenched her back and the muscles of her back. That was evident. I never made any diagnosis of that injury. She stated she was very sore and was in that condition for some time. I reside in Pullman. I have ob-

(Deposition of Eliphalet T. Pattee.)

served the location of this accident prior to the actual happening of this accident. I, as the city physician there, called the attention of the street commissioner to that sidewalk, and my wife was coming down there just that same afternoon—

Mr. HAMBLEN.—I object to that.

Mr. PLUMMER.—There is no objection here.

Mr. HAMBLEN.— I don't know under what stipulation that deposition was taken, and I don't know whether objections had to be made at that time.

The COURT.—There is nothing in the stipulation with regard to objections, so you will proceed with the reading of the deposition.

Mr. HAMBLEN.—Your Honor holds that they cannot be made at this time?

The COURT.—Not unless it was reserved by stipulation.

Mr. HAMBLEN.—There is the further objection which could be made there and that is that the answer is not responsive to the question. [49]

The COURT.—Proceed.

The WITNESS.—My wife was coming down there just that same afternoon just before this accident happened and she slipped and fell there and I know well, during that period of a week, there must have been anyway half a dozen people fell on that place.

Q. Doctor, just state in your own language what was the condition of that walk from your own observation at that time?

A. The city, I understand, had contracted with the

(Deposition of Eliphalet T. Pattee.)

railroad company to put in a new bridge—

Mr. GILBERT.—I object to any statement of this witness as to what the city had contracted about with the railroad company as not the best evidence and hearsay.

The COURT.—Objection sustained.

A. The sidewalk lies to the—well, on this bridge it lies on either side, you see, and they had removed the planks. (Witness draws plat which is marked exhibit "B" and attached to this deposition). This is right at Miller's Cafe. This is the roadway (indicating on exhibit "B") and this is the sidewalk and then right here these planks had been removed and we had to walk around this way (indicating) and the planking was laid and this is a raise there, I would judge of ten inches, a guard you might say of ten inches, and the plank was right across that way and you had to go around; and I understand that everything was covered with ice there that cold spell, and I understand the accident happened on that bridge (indicating). That improvised sidewalk consisted of just simply a plank. I am not a lumber man, but I would say I think I walked over it several times myself, and I would say a plank possibly twelve inches wide. I couldn't say how many of those planks were there. They were laid endways. There was only one plank when I walked over it and a person would have to walk on that plank. There is no ground there over which that improvised sidewalk went, the planks were torn up and that just simply crosses [50] the Palouse River there. There is

(Deposition of Eliphalet T. Pattee.)

the bridge (indicating) and they had to go down this way, and then they walked up on to the incline on a very steep part of the sidewalk, which was very icy and slippery. There was ground under that improvised sidewalk or close to it, as I have just said, from here to here (indicating), up here, the walk crossed the track and went on up the hill. That is after they got across the improvised sidewalk. Under the improvised sidewalk there was, I believe—the track comes here and comes to the right of way and I believe that that is largely on the cinder bed, that the bridge is right upon the cinder bed there, and there is some sort of an excavation. That ground was undergoing a change at that time, that was the cause of the tearing up of the sidewalk and since then a proper sidewalk has been placed there, and the hole filled up, and it was during the changing that this accident happened.

Q. Did you observe whether they placed any special lights in the way of lanterns or anything there?

A. Lanterns?

Q. Yes, sir.

Mr. GILBERT.—When?

A. At the time this accident occurred at that particular place?

Mr. GILBERT.—You mean that particular night?

Mr. SALISBURY.—Yes, sir.

A. I did not observe that because I understand this happened about six o'clock in the evening, just as the people were going home, to their homes;

(Deposition of Eliphalet T. Pattee.)

I could not state that. I did not observe that. The rearranging and the construction work at that particular place was started before the cold weather started in, but because of the cold weather they could not continue or could not finish the work so it laid in that state for a period of several weeks, for some length of time, I could not tell just exactly how [51] long in weeks.

Cross-examination.

On cross-examination by Mr. Gilbert, the witness further testified:

At the time of this accident I had been engaged in the general practice of medicine and surgery and was not limiting my practice to any specialty. Mrs. Branham had not been a patient of mine before I was called. I had charge of the case. When I went to the house she was lying upon a couch and had hot towels wrapped around her ankle. I undid the wrappings and examined it with palpation, and that is I felt of the ankle, and you could determine very readily from the formation, the ankle was not symmetrical, and by the crepitation, and great pain and inversion, so I removed her then immediately to my car and took her to my office and turned on the electricity on it and took an X-ray I should say; took X-ray photographs of it before I reduced the fracture. Unfortunately those plates are broken. I moved my office from the building into the new building that was under construction, and during the moving the girl was careless and they were broken; they are all broken. After the fracture I did not

(Deposition of Eliphalet T. Pattee.)
take any, only to look through the floriscope to see it. I was able to reduce it so as to get the bones in good position. A Potts fracture is an accident of very common occurrence. I would not call it a simple fracture. I will say this, in answering that question, a fracture of any joint, of any bones which form a joint, more or less cause complications of that joint. There was some stiffness in this case and she had trouble with swelling of the joint for months afterwards. There is nothing more complicated or mysterious about a Potts fracture than the things suggested, nothing that an ordinary good physician can reduce and get good results, and I got a good result. I got a good result in reducing her fracture. Her ankle was put in a plaster cast from February, I would say six weeks, for the plaster [52] paris cast, and then I used a splint. That kind of treatment in itself, irrespective of any complication of the joint, to double it up that way, immobilized, would make a person's ankle stiff for some time. The proper treatment for getting rid of that stiffness is massage and use of the ankle, I would say now that she is using her ankle. And she can walk. I noticed her going down the street the other day and I took particular pains to watch her and she was limping slightly. I took particular pains to see that she did not know I was looking, as I wanted to see her. Massage and use of the ankle would be the proper treatment for removing that stiffness. I never ran a sewing-machine so I don't know whether there would be any real objection to a woman like this plaintiff

(Deposition of Eliphalet T. Pattee.)
using both feet in operating an ordinary sewing-machine; I couldn't answer that. She is a frail person and I doubt it, I really have my doubts if she could run a sewing-machine all day with one foot. I wouldn't like a patient of mine to use her foot that way, not unless I was there. I would allow a patient of mine to walk on the foot that has been injured that way after a year. As a matter of fact in the ordinary case of an adult of that age they are invariably out and walking around, after sustaining a Potts fracture, within all the way from three to six weeks. As I stated, they would have to use it very little, to try it out easily, and it would cause some discomfort and also some annoyance and in the following of a livelihood. It is generally recognized among medical men that a reasonable amount of use of a limb which has sustained an injury of that kind is very beneficial, but the point of it is here, how can you regulate it if you allow a patient to promiscuously use her limb, you cannot regulate the patient and she doesn't know how much to manipulate it and that is why I stated that massage and proper treatment would help, under a good competent man. I haven't seen her since the accident, that is to examine it. It is possible that the stiffness might last for three years. [53]

Q. Well, assuming that the stiffness disappears at the end of three years, what, if any, injury would there remain?

A. Taking an injury to any member of the body it places that part more liable to disease, such as rheu-

(Deposition of Eliphalet T. Pattee.)

matism, and that is one thing that I told her that she must guard against, as she is—I don't know her age, but I think she was about forty, around in there, and a woman of her age would have to watch out for that. It would be entirely problematical as to whether she would ever suffer from rheumatism.

Q. At the end of three years, assuming that the stiffness entirely disappears would any injury still remain from which she would suffer?

A. I hardly know how to answer that, because that is so problematical. I would judge that the bone itself for all practical purposes would be as good as ever. The only defect that would be noticeable to her or to others would be the weakness, I would say the weakened condition of the member. I mean to say that after three years there is a probability of this woman finding that her limb is noticeably weaker than it was before the accident, from a practical standpoint. I couldn't state how long that condition would remain, I couldn't tell. I think it would be very probable. I mean to say that in the ordinary case of a fractured limb, it would be weaker than the other; weaker than it was before, very probably, for a period of five or six years after the accident. You must remember that different people have different recuperating powers. I would state in her case that it would be very probable for her to have more or less trouble with that condition over a period of four or five years, but after that, for all practical purposes, she would have complete use of it. She complained of some trouble in her back, and

(Deposition of Eliphalet T. Pattee.)

I simply told her to use some hot packs. I did not examine her back at any time. She did not ask me to examine her back. I thought it was a strain and by rest and [54] care it would adjust itself. This woman went on crutches for a while by my advice. She left Pullman at that time, after her limb got better, so she could travel, and went out to her cousin's and I did not see her over a period of ten days, but as far as I know I would say that she followed my instructions about staying on crutches as long as I wanted her to.

Q. Isn't it a fact that she actually discarded her crutches before you thought it was proper, and you told her she would have to follow your advice about the use of crutches if she was going to continue as your patient?

A. I remember having some talk with her about it. She came to town and I met her down in from of the office—she came in to town in a carriage and she said, "Oh," she says, "my ankle is giving me fits," and I said—I asked her if she had been following my advice. That was after the cast had been removed, and only the posterior splint on it and she said that she had, and I said, "What are you doing in town to-day?" and she says, "Well, I drove in in the carriage," and she had her shoe on and it wasn't laced, and I said, "Is your foot swelling?" and she said it was. I asked her at that time if she had been using the crutches, that afternoon I mean, and she said that she had been using one of them. And I said that, "I think you had better not go too fast about

(Deposition of Eliphalet T. Pattee.)

using your foot, and keep you foot elevated, since we have taken the cast off,'' and she said that she would.

Q. Well, isn't it a fact that she did discard either both or one of the crutches before you as her physician told her it was proper to do so?

A. That was the only occasion that I had to talk to her about it, and I hardly know how to answer that question. I would say that with my patients I always try to have them take the best of care and the best of precaution that no accident happens, because with an ankle in that condition she might have slipped again, which [55] frequently happens many times. I would not say that she had violated my instructions in discarding one or both of those crutches at that time. I am acquainted with Mr. Dow, the city attorney. I do not remember a talk I had with him shortly after the suit was started about the accident, telling him of the nature of the injury. I remember having a talk with him, but I don't remember the substance of the statement.

Q. Do you recall in that talk of telling Mr. Dow that your patient had violated your instructions in laying aside her crutches too soon?

A. I don't think I made the statement that strong.

Q. And you told her she would have to follow your instructions if she was to continue as your patient. Do you remember making any such statement?

A. No, I did not make the statement that strong. I made it just as I stated it to you in that talk on that Saturday afternoon I met her on the street and

(Deposition of Eliphalet T. Pattee.)
she complained of her ankle swelling. It was my opinion that she was going without her crutches as a safeguard and a precaution when she should have used them.

Redirect Examination.

On redirect examination by Mr. Salisbury, the witness further testified:

That fracture was what I would term an ordinary Potts fracture.

Q. Was there, in your opinion, any unusually aggravating features to it and injury there to the internal ligaments?

Mr. GILBERT.—I object to it as not proper redirect examination.

The COURT.—I think the objection is well taken. You may read the answer.

A. You cannot have a Potts fracture without having some [56] injury to the joint and to the tendons or ligaments. There may or may not be two breaks in an injury or fracture of that kind. Two breaks would make the case more complicated. After some three to five years the injury should become permanently healed and in good condition. There might be in this particular instance, with reference to this particular patient, a state of weakness in that injured limb, but as far as the direct injury is concerned that would be totally healed. I refer to the injury to the bone, but it would leave a weakened condition. And the probabilities are that with a woman of her age that that condition would remain with her more or less. I could not say what

(Depostion of Eliphalet T. Pattee.)

date it was that I referred to of Mrs. Branham having gone out to the country and returned in a carriage. You see we had taken the circular cast off and I would say between two and three weeks after the accident. I attended her constantly during that time. I would not say whether or not she committed any act which would add to her injury. As far as I know she did not. While she might have discarded one crutch, if she did not injure herself because of that, it would be immaterial, only as taking a slight risk. And if that did not happen, it was all right of course. As far as I know that did not happen.

Testimony of Dr. C. Hale Kimble, for Plaintiff.

Thereupon Dr. C. HALE KIMBLE was called and sworn as a witness in behalf of the plaintiff, and examined by Mr. Plummer, testified as follows:

The class of work I am carrying on in the city here and have been for a number of years, from a medical standpoint, is drugless treatments, all of the modern, legitimate methods of drugless treatments, mechanical therapy and electric therapy and hydrotherapy, so all of the so-called drugless sciences.

Q. Does your work and experience enable you to treat professionally people who are injured by strains and sprains of [57] the back, ligaments of the back?

A. Yes, really and truly that nature of injury falls particularly within our practice. I have been doing that work eighteen years, twelve years in Spokane;

(Testimony of Dr. C. Hale Kimble.)

I know the plaintiff in this case, Mrs. Branham. She came to me in January, I think it was, on the 29th, 1917, and I treated her continuously, daily treatments, from then through until May 31, 1917, for a spinal injury. I did not put her through an X-ray examination. I treated the conditions which I found, which were acute inflammation and congestion with some lateral sublaxation, that is a little displacement of the spine due largely to shock and injury. An X-ray would only show an osseous displacement. It would not show an injury to the muscles, tendons or other parts which are not of bony substance. Therefore an X-ray would be absolutely useless for those purposes, but you can tell about those conditions existing from your treatment of her. If this accident happened in 1916 it was nearly a year after this accident that I found this condition. I treated her continuously from January through until May. As far as I was able to judge the conditions had largely been ameliorated when she left; the congestion had been reduced and the inflammation had been reduced, but still there was some effect of the injury that was so deep seated it was impossible to get at it, and that remained, of course, with her when she left me.

Cross-examination.

Whereupon upon cross-examination by Mr. Hamblen, the witness further testified:

There was a slight lateral or slight rotary and lateral sublaxation, which was due apparently to a wrench and also to a contraction of the muscles

(Testimony of Dr. C. Hale Kimble.)

which comes from an inflammation of the motor nerves of the spine. I discovered that immediately upon the examination when she came in, on the 29th day of January. When I finished treating her, as far as I was able to judge, there was a [58] replacement, a reduction, you might say, of the laxations and also of the tortion. By laxation I mean a lateral side displacement of the vertebrae. It does not have to be very marked, it can be very slight. And by tortion displacement I mean a turning of the spine. Yes, that would be apparent from an X-ray examination, yet at the same time there are anomalies of the normal spine, certain anomalies. No two spines are diagrammatically the same. And at the same time a misplacement of that kind might be considered to be a perfectly normal condition, just the same as a malalignment of the spinus processes might be considered as perfectly normal. The condition that I found in her spine might be considered by persons who have not had the training to discover those things as a perfectly normal condition, but if it was normal there would not have been any inflammation. The fact of its being an abnormal condition was shown in the congestion, in the inflammation and the impingement on the spinal nerves. If it had been normal it would not have had any of that condition. When I was through with her, as far as I was able to judge, we had carried her as far as those methods would carry her. I did not touch her ankle, because I did not have the supervision of that, and I did not do anything

(Testimony of Dr. C. Hale Kimble.)
with it at all. I understood that was under the care of another physician.

Whereupon the plaintiff rested and the following proceedings were had:

Defendants moved the Court for judgment on the ground that plaintiff had failed to make out a cause of action, which motion was overruled and excepted to by the defendants.

Whereupon counsel for the defendants introduced the following testimony.

DEFENDANTS' TESTIMONY.

Testimony of Dr. Carl H. Wiseman, for Defendants.

Dr. CARL H. WISEMAN, a witness produced by the defendants, being first duly sworn, examined by Mr. Hamblen, testified as [59] follows:

My profession is that of physician and surgeon. Since coming into court this afternoon I have examined Mrs. Branham's ankle where the fracture occurred. I found a little roughness on the outside bone of the lower leg about an inch and a half above the ankle joint, which was in all probability the location of the break, a little irregularity there in the bone. That is the point where the bone is usually broken in a Potts fracture, where this bone is broken. The inside bone, I could not find anything that indicated that there had been any fracture. It might be possible that there had been, but there is no evidence of it at the present time. All the movements of the ankle joint are free and easy. In my opinion there has been a good union, the bone

(Testimony of Dr. Carl H. Wiseman.)

has united perfectly. There is no permanent injury as a result of it. With reference to a break of that kind, if it heals as this has healed, at about from six months to one year following the break the leg is just as strong as it ever was. I did not find anything which would indicate a permanent injury. It was rather hard to find any evidence at all. It was just a slight enlargement over that one point. An ordinary observer probably would not even discover that.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he further testified:

I would not say that those bones might not have been broken. I say I could not find any evidence of any break in the other bone, and a very slight evidence in this one.

Q. In an inquiry of that kind, Doctor, assuming, now, that both bones were broken in an injury of that kind, it would injure more or less, would it not, the ligaments, muscles and tendons of that particular part of the limb?

A. No, that is just the thing that prevents any injury to the ligaments. The bone gives way and breaks. The way that prevents [60] injury to the ligaments is the break of the bone relieves the strain on the ligaments. Just as you would have a sprained ankle or dislocated joint. That is exactly what breaks this bone here is the tension on the ligaments there, throwing the foot in this position (indicating). Unless the bone gives way you will have

(Testimony of Dr. Carl H. Wiseman.)

a sprained ankle which means a—these ligaments run up and down. These are tendons (indicating). Yes, the ankle has some of those.

Q. Now, whenever you break this off doesn't it stretch this side of the ligaments or tendons or anything of that kind, or expand them or stretch them?

A. The bone might tear loose from the ligaments.

Q. Well, if it does not go to that extent of tearing loose, won't it extend those out and shorten the others, the giving way of the bone? A. No.

Mr. HAMBLEN.—We haven't the original contract here, but I have a copy here, and Mr. Plummer said he would make no objection.

Mr. PLUMMER.—I said I would make no objection to it being a copy, but I have not seen the contract yet.

Mr. HAMBLEN.—I wish to offer this contract.

Mr. PLUMMER.—I object to it on the ground it is incompetent, irrelevant and immaterial and does not tend to disprove any of the allegations of the complaint. What they agreed to do and what they did do are two different things.

Mr. HAMBLEN.—I will state that the original was not signed by the Northern Pacific.

The COURT.—You may proceed with the testimony and I will read this.

Testimony of Mrs. Matilda F. Gannon, for Defendants.

Mrs. MATILDA F. GANNON, called as a witness in behalf of the defendants, being first duly sworn, examined by Mr. Hamblen, [61] testified as follows:

I am city clerk of the city of Pullman; have lived in Pullman twenty-five years. Have been city clerk there five years; was city clerk on the 3d day of March, 1916. This instrument that you hand me, and this is identified as Defendants' Exhibit 2 for identification, was filed with me on the 3d day of March, 1916, filed with me as clerk of the city of Pullman.

(Whereupon said paper was offered and admitted in evidence without objection and marked Defendant's Exhibit 2.)

Testimony of D. C. Dow, for Defendants.

D. C. DOW, called as a witness in behalf of the defendants, being first duly sworn, and examined by Mr. Hamblen, testified as follows:

My profession is lawyer. I am the city attorney of Pullman at the present time, and have been such since January, 1917, I am familiar with this case and was connected with it officially when the city was a party. During the 3d, 4th and 5th of July, 1917, there was a soldiers' reunion, and a Fourth of July celebration at Pullman. The rink adjoins the park where the celebration was held. And on the evening of the 5th there was a dance conducted at the

(Testimony of D. C. Dow.)

skating rink. After the exercises at the park I dropped in to watch them dance, and Mrs. Branham was there and I saw her dance. The official connection that I had with the program that night was that I presided at the exercises at the park. This was on the 5th of July, 1917. Mrs. Branham danced with several people. I happen—how I happened to observe that, this case had been started some time prior to that time, and the city was still a party in the case at that time. The case had not been dismissed as to the city yet, and I saw her dancing. I took particular note of the fact that she was there and that she was dancing, and some of the parties that she danced with. I presume I was there an hour altogether. She **[62]** danced several times, I know of two parties. I have the names of two parties that she danced with, and there were two or three other dances that she danced during the time that I was there. She was dancing. There was a big crowd there and it was a real dance with plenty of music. I could not observe, while she was dancing, from the way she danced, that she was handicapped at all by reason of this. I had not danced for years.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he further testified:

I just dropped in to this dance to see them dancing. I didn't know she was there until I got there. I stayed about an hour. That was a little more than

(Testimony of D. C. Dow.)
a drop in. There was a big crowd there and I saw her dancing several times.

Q. Since we let the city out of this thing, you have gone to the other side and told them all you could and showed some interest against Mrs. Branham?

A. Not particularly. I have been asked by the attorney for the railroad company—we were both defendants in the suit, and we went over the whole thing.

The COURT.—I will admit this contract for the purpose of showing the relation of the different parties to it.

(Whereupon the contract was admitted in evidence and marked Defendants' Exhibit 5.)

Testimony of Dr. M. F. Setters, for Plaintiff.

Dr. M. F. SETTERS, called as a witness out of order for the plaintiff, being first duly sworn, and examined by Mr. Plummer, testified as follows:

I am a practicing physician and surgeon of this city and have been for twenty years. I know the plaintiff in this case, Mrs. Branham; treated her and examined her ankle professionally. **[63]** some time ago, the first one the 4th of February, 1917. She had received a Potts fracture, which was broken, one broken bone, and a chip off of the other bone, leaving a weakened ankle, and she was then in a neurasthenic condition, which means a general nervous breakdown, which was very marked at that time, very decidedly. Assuming that there had been a Potts fracture there and both bones broken and

(Testimony of Dr. M. F. Setters.)
the doctor had obtained the result which I found there from my examination, considering that she was forty-one years old when it happened and considering the recuperative powers of a woman of that age as compared with others, a break of that kind usually involves the joint, and usually leaves a stiffness of the joint through life. Assuming there was an injury to the ligaments or muscles, in a woman of that age there would be undoubtedly a stiffness in the joint and she would never get the same flexibility. I don't think it would ever be repaired as it was before the break. She could walk and hop around and dance. I examined her back at that time. There is objective and subjective symptoms on all these patients. The subjective is what they tell me, the objective is what you see. The subjective symptoms were that she had a good deal of pain. In the examination of the back there was very little found except there was an increased irritability over the spine and also of the nerves below the spine. She had traumatic neurasthenia. In a woman of her age and of her circumstances this neurasthenic condition lasts from one to five years. A neurasthenic case is not able to earn any money, because their whole concentration of mind is on themselves. I have forgotten the percentage of neurasthenic conditions becoming chronic in a woman of her age, but the theory is usually about one in three, about thirty-three and one-third per cent.

(Testimony of Dr. M. F. Setters.)

Cross-examination.

On cross-examination by Mr. Hamblen, he further testified:

In the examination of the back there were no objective [64] symptoms except a little irritability. That irritability was not suggestive, you could get that by the reflexes, by the contraction of the muscles when you tapped them on the back; you can get that objectively. I have not examined her since that time and have not examined her prior to that time. That is the only time I ever saw her. The bones have united, leaving a stiff joint at that time. I did not treat her. I have forgotten who sent her over to my office for an examination. It was for the purpose of a report on her condition. I am not positive whether it was Mr. Salisbury that requested it.

Testimony of E. D. McDonald, for Defendants.

E. D. McDONALD, called as a witness in behalf of the defendants, being first duly sworn and examined by Mr. Hamblen, testified as follows:

I am claim agent of the O.–W. R. & N. and have been in the claim department for about nine years. As claim agent I investigate claims that are made against the company where accidents have happened. I first learned of this accident to Mrs. Branham about October 10, 1916. After that time I called upon Mrs. Branham, got a statement from her direct relative to the accident. That was on October 19th, 1916, at the Ridpath Hotel, in Spokane. At that time she was living at the Ridpath. I reduced the

(Testimony of E. D. McDonald.)
statement which she made at that time to writing, and had her sign it. I read it to her as I sat beside her. I talked with the lady and ascertained from her just how it occurred, and then I wrote it down, and read it over to her, and she sat beside me so she could see me while I was writing, and she signed the statement. This instrument marked Defendants' Exhibit 3 for identification is the statement which was made at that time and which was read to her and signed by her. There was no change of any kind made in that after she signed it.

(Thereupon the statement was offered [65] in evidence, marked Defendants' Exhibit 3, and admitted without objection.)

Cross-examination.

Thereupon, upon cross-examination by Mr. Plummer, the witness further testified:

My part of the work as claim agent for this company in case of any litigation that might be set or pending is to get the facts as to all of these accidents. It is not altogether my duty to look up evidence; partly to get witnesses and help prepare the defense. I get these statements so as to get the facts as to how the accident happened. I did not get all my facts before I talked with her. At the time I got this statement it was in the lobby of the hotel, and there were a number of people around there. There was nobody immediately present that could hear what I said and what she said. I wrote this in the lobby on my knee. I wrote these two pages on my knee. It

(Testimony of E. D. McDonald.)

was just as handy to write them on my knee as to go to a table.

Q. Why didn't you ask her to write out something in her own handwriting as to how the thing happened?

Mr. HAMBLEN.—I object to that as immaterial.

Mr. PLUMMER.—Oh, to show his interest in the thing.

A. It was not necessary, because I could write it out for her.

Redirect Examination.

Thereupon, upon redirect examination by Mr. Hamblen, the witness further testified:

I took the original of this picture that you hand me; this is an enlargement of it. This shows a portion of the situation there after the bridge was completed, that is, from the O.–W. looking north and takes in just a part of Miller's restaurant here, shows the sidewalk of the bridge from the O.–W. up to the Northern Pacific. This was taken about the 18th of October, 1916, after the [66] work was completed and after the snow was off. I took this looking opposite direction from the N. P. right of way.

(Whereupon said photograph was admitted in evidence without objection and marked Defendants' Exhibits 6 and 7.)

Testimony of C. M. Hooper, for Defendants.

C. M. HOOPER, called as a witness in behalf of the defendants, being first duly sworn, and examined by Mr. Hamblen, testified as follows:

(Testimony of C. M. Hooper.)

I live at Pullman; been living there about nineteen years and seven years I have been working for the city as superintendent of the water department and also street commissioner. I am at the present time street commissioner. I was familiar with the situation there at the bridge in Pullman along in February, 1916. I remember of an accident there, but I did not know at the time who fell until the next morning. My office is about, I judge, 150 or 200 feet from the place where the accident was, and the O. R. & N. company was putting a top on a bridge there, and there was an opening I judge of five or six feet wide on the east side of the north approach to the bridge that never had been filled in, and the sidewalk covered it when the sidewalk was there, but the sidewalk had been taken out by the bridge crew, that is the railroad crew, and they had laid some three by twelve lengths parallelling where the old sidewalk used to be in the place of the sidewalk, and the pedestrians were travelling on the left hand side of that, and at the end of this bridge plank over there there was three more planks laying across to catch the bridge, so the pedestrians could use that to cross. Indicating on exhibit 1, my office was right about that point right there, which I will mark "office." I was coming out of my office at the time it happened, and I saw a man coming along there pretty rapidly, and he evidently saw the lady fall. It was Mr. Price. I did not see the [67] lady fall, because I was standing over there, and I think this bridge is, it is a high iron bridge, and I don't know but what it

(Testimony of C. M. Hooper.)

would bar my sight from seeing across to that direction where she was. Whether it would or not, I don't know, but I did not see it, anyway. When I saw him come across I started to see what was the matter with him, and he was helping the lady up here, and they were right about at this point here when I seen them. They were coming this way, that is going north. I came across on this side over here to the depot. The depot is up in here somewhere, I did not know who she was at that time. I don't know that I observed anything about her wearing apparel any more than that she had high-heeled shoes on, about that high (indicating), about two inches I guess they must have been. I happened to see those just as naturally, anybody would notice them and I thought at the time that she fell about it being peculiar. At the north end of the bridge there was a barrier there. The barrier was across this bridge. There was a post up here right at the corner of this bridge, and they were putting wood blocks all over the top of this. Right where you mark "post" there was a post there and a barrier all across there; a post across here six or eight feet, I should say. That is at Miller's restaurant. And there was a one by six plank up there, and that end was resting up there. By this end I mean the center of the bridge. That is the way the condition was. That completely blocked the walk away from the bridge, they would have to step over the plank to get across there; but that plank had been laid down in some way, it had been—it was down that night. If Mrs. Branham

(Testimony of C. M. Hooper.)

fell within two or three feet of where the barrier was, she would have to step over the barrier there, either do that or move it. There were planks all along in there parallel to the sidewalk there. They were there for the bridge crew to work on. I know that because I seen them working there and I know their material. Nearly all of it lay off in here (indicating). The [68] route taken by pedestrians as they cross that bridge was to go clear outside of those planks, to the east, between that and the restaurant. There is a porch of about six feet that comes out from the restaurant like that, and the pedestrians went between this plank and that porch. To go back on to the sidewalk on the bridge there were some planks laying this way, bridge planks, three by twelve, running across the end of the bridge and across this hole. There was a big banister here, right across from here, and that taps on to the bridge rail. I don't know anything about how the sidewalk was, whether the sidewalk on the bridge had been completed clear to the north line or not; I could not say as to that. I don't know. I did not make any investigation of that after the accident happened. As near as I can tell Defendants' Exhibit 7 is just the identical representation of the bridge and the walk as it is now in *from* of the Miller place and extending along there in a southerly direction. The barricade would come to this point right here, and where pedestrians went was dirt here. The people would have to walk there to get over there, because these plank lay right in there, like this cut shows

(Testimony of C. M. Hooper.)

here, the bridge plank lay in here, and this hole extended out here a foot or two past that, and it was built afterwards. That barricade came away out to about there, and the other post was out about there (indicating); that is on the curb of the roadway.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, the witness further testified:

There was a banister ran out from the restaurant that ran out and tapped on to the rail along the sidewalk on the bridge; it shows it right in that cut there. A person coming from the direction in which this lady was coming there, in order to get on to that bridge would not have to walk on to this plank; she could get on to the plank on the side next to town. I say there was a banister [69] running from this restaurant that ran over to this rail, and this rail ran along here. All of this part is shut out by this rail. If a person is coming down here and wants to get across that bridge, they can get over here by walking along her, right along the bridge there. That rail extended about there, as far as that cut shows it. They could walk anywhere along here; if this rail was not there they could walk along here. Here is where people did walk. There were three bridge planks here that were there for the bridge crew. They were blocked up there, they were blocked at this end; there was a barrier there all the time. There was one there at night, except when this was down there at night and the accident happened. I mean to say that in front of this plank there was a

(Testimony of C. M. Hooper.)

barrier, north of the sidewalk. There was nothing on that side at all. This barrier extended out past those planks, but I don't know how far past those planks, over this way. There was three posts, to my knowing; there was a post up here and a post at that corner, and a post over there, and I think there was one in the center. It wasn't their intention that everybody who used that street should jump over that plank. The plank lay across from that bridge over to here, for them to go on. The bridge crew laid the planks there. The plank that the people were supposed to walk on were laid there by the bridge crew so that people could get onto this bridge from this street across to here. As a matter of fact there was a path all the way along there. The bridge crew worked on that all the time. The bridge crew had laid off then on account of orders. I could not say whether they laid off on account of the weather. I could not say whether this was about six o'clock; it was not dark yet. I don't know what time it was, it was not dark. I saw the man walking along because he passed perhaps as far as from here to that wall in front of my door. I saw him just as I would see you walking along there, and he was walking pretty fast. I did not see the lady fall. I did not see the lady that had fallen on the [70] plank. He had gotten there and had helped her up when I seen her. He had her by the arm. They were not walking along; they were standing still at the time I saw them. I was the length of this room perhaps away from them when I saw them. I did not go

(Testimony of C. M. Hooper.)
towards them after I saw them up; I went to the depot. I was going to the depot; I was on my way to the depot and I went to the depot on the opposite side of the bridge from these people. I was thirty or thirty-five feet away from her when I saw her standing up with Mr. Price, something like that. They stood still while I was looking at them just a few minutes, because I did not pay any attention to them. He helped her up. I didn't suppose anybody was hurt at all. I don't know whether they walked off or not after he lifted her up. They were there where I seen them, they were standing up there. I could not say how long they stood there, because I was going across to my work and paid no attention to them. I saw these high-heeled shoes all of that time; all of that distance I saw those great big high-heeled shoes.

Q. All of the time while she was walking through the snow? A. Yes, sir.

Mr. HAMBLEN.—I want to read the deposition of Mr. Price.

Deposition of Charles A. Price, for Defendants.

Thereupon the deposition of CHARLES A. PRICE, a witness on behalf of the defendants, was read by Mr. Hamblen, as follows:

I live in Long Beach, Los Angeles County. In October, 1916, I lived in Pullman; had been living there at that time something like ten or eleven years; was engaged in the feed and grain business. At present I am retired. I am acquainted with Mrs. A. D. Branham, slightly acquainted with her. I

(Deposition of Charles A. Price.)

have known her for something like two years, I think; I guess it was about two years, at the time of this accident. I saw the accident in February, 1916, when Mrs. Branham fell and turned her ankle; saw it when it happened. [71] It was a somewhat cloudy day on which this accident occurred, and it occurred about five thirty or five forty-five P. M. The conditions as they existed right at that particular time and place were that the Oregon-Washington Railroad & Navigation Company were repairing a bridge across the Palouse River, and they had some workmen there repairing this bridgeway, which led from the business side of the town over across the river to the residence district where this lady, Mrs. Branham, and I and others lived, and we were in the habit of crossing this bridge to and from the business district. And when the railroad company came there to repair this bridge, they put up a sign there warning us people to stay off the bridgeway. As near as I can remember it that warning said to pass around over the left in coming to town—or to the right in going north, of a certain restaurant building, known as Miller's restaurant. This passageway which this sign told people to take was not exactly an easy way, you had to pass out around the restaurant and onto the railroad right of way, and come on back on this sidewalk that led over into the town—so it made it somewhat an inconvenient way to go around. But it was a perfectly safe way. But we people who lived over on that side would insist on going straight across there during the time that they were making

(Deposition of Charles A. Price.)

these repairs. But at this particular time, shortly before this lady was hurt, there came a snowstorm which delayed the work for the time being, when they had this bridgeway probably about two-third completed, over across the most dangerous part of the crossing, and along that part of the bridge the company had placed planks, about three by twelve lying lengthwise along there for their workmen's protection, and for the workmen to walk on. In addition to these signs warning the public to stay off the bridge, and to go around the restaurant, the railroad company had placed a bulwark at the north end of the bridgeway, to block the passageway, and to keep people from using the bridge while it was being [72] repaired. The unsafe condition of this bridge was open and obvious to anyone passing along there, so that anybody could see it; it was plainly in sight so that anybody could see it. As I said a moment ago, there had come a snow storm, and the snow had piled up there perhaps six inches or more deep, and the snow had piled up on these planks, and on the edges of the planks, where the workmen had been walking along there, the snow was thinner and it was coned up in the middle from three to four inches high, in the center of the plank. That could be seen by people who started to walk over that bridge, certainly. I and the druggist, Mr. Pinkley, were walking along there together, about 5:30 or maybe a quarter to six in the evening, and we were going right along this bridgeway, and I noticed this lady, Mrs. Branham, step along this walk there, and

(Deposition of Charles A. Price.)

step around this bulwark that had been placed there to keep people from using this bridge while it was undergoing repairs, and she stepped around this bulwark, coming from the north end and stepped on to these planks that I have described, that were lying lengthwise and as she stepped on the edge of the plank, she just went down—she did not fall, or anything like that, but just seemed to settle right down, just sat right down on the bridgeway. And Mr. Pinkley and I ran to her and got hold of her and asked her if she had been hurt, and she said that she did not know whether she was hurt or not, and Mr. Pinkley asked her if she thought that she would be able to walk, and she said she thought she could, and she walked away without assistance, although she limped as she went away. And as she walked away, I noticed particularly that she had on a pair of these very high-heeled shoes that the women wear. I noticed that she did not have on any rubbers and that she had on a pair of those extremely high-heeled shoes. I don't know anything at all about the extent of her injuries, or how bad she was hurt, or anything of that kind. There was nothing to hinder anyone approaching this bridgeway from seeing the conditions that confronted her [73] when she walked around this bulwark and started across that bridge; there was nothing to hinder her from seeing the conditions there, just as I have described them. And there was a safe passage around the other way, and the railroad company had put up a sign there warning the public to use this other way around. This

lady had come across a worse place than the place where she fell—further back the ground was slippery with ice, and where she fell there was just snow. The extremely high-heeled shoes caused her ankle to turn as she was walking along there.

Whereupon the defendants rested and the following proceedings were had:

PLAINTIFF'S REBUTTAL TESTIMONY.

Testimony of Mrs. A. D. Branham, in Her Own Behalf (in Rebuttal).

Mrs. A. D. BRANHAM, recalled as a witness in her own behalf in rebuttal, upon examination by Mr. Plummer, testified as follows:

Referring to this claim that was filed with the city a few days after the accident, at that time I did not know or appreciate the extent of my injuries, what they would be in the future, or what they had been since that time. Mr. Matthews got that up for me. At that time I was suffering from this injury that I speak of, and the back injuries. He brought that up and I signed it a few days after I was hurt. He didn't send it in until later.

Q. About these high-heeled shoes, I want to know all about those high-heeled shoes, Mrs. Branham. In the first place, let me ask you this, the question of work that you were doing, of dressmaking, state whether or not it required you to walk a great deal around town to places in doing your work?

A. Yes, sir.

Mr. HAMBLEN.—Objected to as incompetent,

irrelevant and [74] immaterial.

Mr. PLUMMER.—I want to show that she had to walk a lot and had to use a walkable shoe.

Mr. HAMBLEN.—I don't think that is the proper question. I move to strike out the answer. It should not have been answered.

The COURT.—It is argumentative, I think.

A. They were a very ordinary walking shoe that I wore on that day, with a plain Cuban heel. The heel was not like this. A Cuban heel comes straight down, and it was a medium-sized heel. It was not a heel like this. The heel was not as high a heel and narrow a heel as this.

Q. Why do you wear that heel now?

A. Because I cannot wear a shoe.

Mr. HAMBLEN.—I object to that, if the Court please.

The COURT.—Sustained.

A. Because I cannot wear a shoe.

Mr. HAMBLEN.—Just a minute.

The WITNESS.—The heel that I had on that day, from the bottom of it up to here was not more than that high (indicating), not more than an inch and a half, and it came straight down, did not curve in like that; a plain Cuban heel, which comes with a high-heeled walking shoe. It was what is called a military heel. During that time and before the accident and at the time of the accident my daughter was with me in such a way that she would know what kind of shoes I wore.

(Testimony of Mrs. A. D. Branham.)

Cross-examination.

Whereupon upon cross-examination by Mr. Hamblen, she further testified:

There are different heights in those military heels that I speak of. In talking to Mr. McDonald one time after the time that this statement was made I do not remember any such statement as that these heels—that my heels were not over two inches high. I [75] did not discuss the high-heeled shoes that night with the gentleman that picked me up. I did not know after I talked with Mr. McDonald the claim would be made that my heels were high, and that would be one of the causes; I did not discuss those heels with anyone.

Testimony of Wilma Branham, for Plaintiff (in Rebuttal).

WILMA BRANHAM, being recalled as a witness in behalf of the plaintiff in rebuttal, being examined by Mr. Plummer, testified as follows:

I know the kind of shoes my mother wore at the time she was hurt; I know the kind she had on hand to wear. She did not have any kind of shoes at all, what they call a high-heeled shoe, or a shoe with a heel that high. The kind of heel or shoe that she wore when she got hurt, it was not a French heel, it was a Cuban heel, and it was not high, it was medium high; it was not a high heel. She did not have any French heeled shoes at all. I think that was the only pair of shoes she had. These are high-heeled shoes that I have on now; they are not mili-

(Testimony of Wilma Branham.)

tary heels. The kind of heels on my mother's shoes were Cuban heels; it is wider, more of a flat heel. These were real flat heels that my mother had on. They were maybe a little more than a half an inch, maybe three quarter, I don't know. I discussed the matter of heels with my mother at that time. It was not considered by me as a possible cause of the accident. We discussed the matter of heels at that time because it was stated that she had on high heels; that was a long time afterwards; that was the only way that we ever did discuss about the heels, was that she was accused of having high-heeled shoes, and I knew she did not, and she knew she did not.

Cross-examination.

Whereupon, upon cross-examination by Mr. Hamblen, she further testified:

Q. Just take this pencil and put your thumb there and **[76]** show about how high that heel was. Give the jury some idea.

The COURT.—I presume the jury knows what three-quarters of an inch is.

Mr. HAMBLEN.—She stated a little more than that.

A. Well, I don't know. I think it was just about like that. It was not much higher than that.

Mr. HAMBLEN.—Let us make a mark on that pencil and put it in evidence, where your thumb is. (Marking pencil.)

The WITNESS.—I don't know how wide it was

across the bottom of the heel. About that wide (indicating).

(Whereupon said pencil was admitted in evidence without objection, and marked Defendants' Exhibit 8.)

Whereupon the plaintiff rested, and the following proceedings were had:

Mr. HAMBLEN.—If your Honor please, I wish to renew my motion at this time, in view of the contract which has been shown here, in which the city expressly undertakes to protect the sidewalk during the period of construction. (Reading sec. 5 of the contract to the Court.) There is nothing shown that there is any violation of that paragraph, and the burden is on the city, according to the contract, to keep that street closed, and I therefore renew our motion and ask for a directed verdict.

The COURT.—Suppose they did not keep it closed?

Mr. HAMBLEN.—Then the burden is upon the city and not upon the company here, and if there is any negligence there, it is the negligence of the city and not the negligence of this company. It seems to me it is absolutely clear. The duty under the contract by which this company undertook to repair this bridge, the duty is upon the city to keep that bridge closed. The city did not keep it closed, or at least the people went upon it. That does not shift the burden upon the O.-W. R. & N. Company. The duty is still there upon the city, and it seems to me, as a matter of law, [77] that the defendant is not—

The COURT.—Unless this walk, or whatever it might have been, was constructed by the O.-W. R. & N. for the use of the travelling public, I would charge the jury as a matter of law that it owed no duty to the public in regard to its construction or maintenance. But if it was constructed there for the use of the public by the railway company, of course it was its duty to see that it was constructed properly or safely at least, and kept in a reasonably safe condition during the period of construction.

Mr. HAMBLEN.—But that does not relieve the city, if your Honor please, from keeping the bridge closed. The testimony shows that that was constructed for the use of the workmen for the company here.

The COURT.—Well, that will be a question for the jury.

Defendants excepted to the ruling of the Court, which exception was allowed by the Court.

THEREUPON, before the Court instructed the jury, the defendant requested the Court to give the following instructions:

INSTRUCTION No. 1.

I instruct you to return a verdict in this case in favor of the defendant.

INSTRUCTION No. 2.

The negligence of the defendant alleged in the complaint in order to entitle you to find for the plaintiff must be proved by preponderance of the evidence, and such proof must be confined to the negligence complained of. Hence, if you should find that the defendant was negligent in some respect

other than that charged in the complaint, or if you should find that the negligence which caused the injury to plaintiff was due to the action of some other agency, then I instruct you to return a verdict in favor of the defendant. **[78]**

INSTRUCTION No. 3.

From the mere fact that an accident happened and plaintiff was injured you are not to infer negligence on the part of the defendant, but the presumption is that the defendant was exercising due care at all times and the burden is upon the plaintiff to overcome this presumption by a preponderance of all of the evidence in the case.

INSTRUCTION No. 4.

I instruct you that the reconstruction and repair of the bridge along Kamiaken Street in the town of Pullman by the defendant, Oregon-Washington Railroad & Navigation Company, was undertaken by said defendant under and pursuant to a contract in writing entered into between the town of Pullman and the defendant, Oregon-Washington Railroad & Navigation Company, by the terms of which the said town of Pullman expressly agreed to keep the said street and bridge closed during the said period of repair and reconstruction. Therefore, if you find from the evidence that the town of Pullman failed to close the said bridge in accordance with the terms of the contract above referred to and permitted the same to be used by the public during the said period of repair and reconstruction and if you further find from the evidence that by reason of the failure of the said town of Pullman to so close

the said bridge that plaintiff entered upon the same and while on the same or a part thereof slipped and fell and was injured, then you are instructed that this defendant is not liable therefor and your verdict should be for the defendant.

INSTRUCTION No. 5.

I instruct you that it was not the duty of the defendant company to keep the sidewalks along Kamiaken Street bridge free and clear of snow and ice or either, and if you find from the evidence that at the time the alleged accident happened the sidewalk on which plaintiff was walking was covered with snow and ice and by **[79]** reason of such condition the plaintiff slipped and fell and was injured, then the defendant cannot be held for such injuries and I instruct you to return a verdict for the defendant.

INSTRUCTION No. 6.

I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalk on said bridge over and along Kamiaken Street, and you further find that the accident to the plaintiff from which she sustained her injuries complained of was due as much to the slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that

the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant.

INSTRUCTION No. 7.

The Court instructs you that the plaintiff, Mrs. Branham, was required under the law to use ordinary care in passing over the sidewalks of the town of Pullman, and the walk on the bridge in question, and if you find from the evidence that the sidewalk of the town of Pullman in question, was defective and in a dangerous condition due to the negligence of the defendant at the time and place of the accident, you will next proceed to determine whether plaintiff at said time and place was exercising ordinary care.

By ordinary care is meant the care which an ordinarily prudent person would use in travelling over the sidewalks of the city, and if you find from the evidence that Mrs. Branham at the time and place of the accident was not using ordinary care in travelling over the said sidewalks of the city, as I have defined the meaning of the words, ordinary care, then you must find for the defendant, notwithstanding that you might believe from the [80] evidence that the defendant at the time and place of the accident was negligent in some particular complained of by the plaintiff; provided further you find from the evidence that the want of care of Mrs. Branham in travelling over the sidewalk at the time and place of the accident contributed proximately to her accident and the injury resulting therefrom.

INSTRUCTION No. 8.

I instruct you that if either the knowledge of the

condition of the sidewalk of the place upon which Mrs. Branham slipped and fell, or the fact that she was wearing at the time improper shoes with which to go upon a walk the condition of which she knew was the primary cause of the accident, she was guilty of contributory negligence and cannot recover and the verdict should be for the defendant.

INSTRUCTION No. 9.

I instruct you that when a person knows of a dangerous sidewalk, or a sidewalk in a dangerous condition, the law requires of her to exercise such reasonable care as the ordinarily prudent and cautious person would use under like circumstances. If this is done and injury results, the person is without fault and if you find this to be the case, then Mrs. Branham was not guilty of contributory negligence. If this were not done and the failure so to do proximately contributed to the injury sustained by Mrs. Branham, then she would be guilty of contributory negligence and could not recover.

The question of whether upon all facts in the case as disclosed by the evidence, Mrs. Branham was or was not guilty of contributory negligence, is one for your determination.

If from the evidence you find that she was guilty of contributory negligence and such negligence on her part was the proximate cause of the injury sustained by her, then you shall find for the defendant. **[81]**

INSTRUCTION No. 10.

If from the evidence introduced upon the trial, carefully considered by you in the light of the in-

structions given you by the Court, you determine that the plaintiff should recover, then you are to assess her damages, but in doing this you must have due regard to the rights of the defendant. Compensation in money is what the law proposes to give where liability is established.

INSTRUCTION No. 11.

I instruct you that the undisputed evidence in this case is to the effect that barriers were placed at the north end of the bridge and sidewalk extending clear across the same.

I further instruct you that the undisputed evidence is that in order to go upon the sidewalk on which plaintiff fell, she was required to pass around the end of the barrier so placed.

I further instruct you that if you find that in so doing she did not exercise ordinary care, as heretofore defined in these instructions, then you will find her guilty of contributory negligence and your verdict shall be for the defendant. The fact that other persons had travelled the street and taken the risk incident to going upon the walk in the condition in which it was, does not change the rule herein laid down. There are always persons who take risks if a short cut can be made and who will go upon a street even if it is obviously not open to public travel.

INSTRUCTION No. 12.

If under the instructions I have given you, you find that the plaintiff is entitled to recovery, then you will allow her such sum as will fairly compensate her for the pecuniary loss which she has suf-

fered by reason of the injury complained of, and in this connection you may take into account her age, habits of life, industry; the work and character of work performed by her prior to the accident, the work and character of work if any, which she has performed since the accident; the pain and suffering if any as a [82] result of the injury.

INSTRUCTION No. 13.

If under the charge of the Court you should find for the plaintiff, yet if under the evidence you believe that the plaintiff is able to work and earn money, it is her duty to do so and thereby lessen and avoid so far as she can do so the consequences resulting from the injury complained of, and it is your duty in assessing the damage to diminish the amount thereof to that extent.

INSTRUCTION No. 14.

In considering this case and in arriving at a verdict you will not allow yourselves to be influenced or controlled by any consideration of feelings or passion, prejudice or sympathy for or against either party to the cause, nor will you be influenced or controlled by the fact that the defendant is a corporation, but it is your duty and you are required under the law to decide the case the same as if the parties to the litigation were both natural persons.

It was stipulated between counsel that in event of the submission of the case to the jury and the return of a verdict against the defendant and in favor of the plaintiff, the defendant might interpose a motion for judgment notwithstanding the verdict, and no legal objection will be raised to the making

of such motion and its consideration by the Court.

Thereupon an adjournment was taken until 10:00 o'clock A. M., Monday, September 23, 1918, at which time arguments were made to the jury on behalf of the plaintiff and defendant.

Thereupon the Court instructed the jury as follows:

Gentlemen of the Jury: This is an action to recover damages for personal injury. The action is based upon negligence. **[83]** Negligence is defined as the doing of that which a reasonably careful, prudent and considerate man would not have done under like circumstances and conditions; or the failure to do that which a reasonably careful, prudent and considerate man would have done under the like circumstances and conditions.

There are two defendants mentioned in the complaint in this action. One is the city of Pullman and the other is the Oregon-Washington Railway & Navigation Company. The charge of negligence against the Railway Company is in substance that it constructed and maintained a dangerous walk on a certain street in the city of Pullman, while it was engaged in the construction of a bridge across that street under a contract with the city of Pullman.

You will distinguish, then, in this case, between the duty which was imposed upon the Railway Company here and the duty which was imposed upon the city itself.

It is the duty of a municipal corporation to see that all its streets are kept in reasonably safe condition for public travel; and if they are not in safe

condition it is its duty to erect proper barriers to keep the public from entering into the dangerous places.

A contractor with the city, however, is only liable for its own negligence. It is not liable for the general condition of the street unless that condition was produced or brought about by its own action.

If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railway & Navigation Company for the use of foot-passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably **[84]** safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

If you find that the railway company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she herself was guilty of contributory negligence.

In determining the question of contributory negligence you have the right to consider the barrier that was placed in the street, the kind of shoes the plaintiff wore and how she conducted herself and

all the surrounding circumstances.

If the city constructed a barrier there sufficient to warn the public against the use of the street and they persisted in using it, then neither the city nor the railway company is responsible for what might happen then, because they assumed all risks in going in a forbidden place. But, in determining that question, you have a right to consider whether or not the barrier constructed by the city, if any was constructed, to warn the public against the use of the street, and the mere fact that others may have used it, would not be conclusive upon that question. On the other hand, Gentlemen of the Jury, I charge you as a matter of law that the railway company was not responsible for the accumulation of ice and snow upon that walk and was under no obligation to remove it. And if you find that the existence of the snow and ice on the walk was the sole and only cause of the plaintiff's injury, then she cannot recover.

You, Gentlemen of the Jury, are the sole judges of the facts in this case and the credibility of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the **[85]** stand, their interests in the result of your verdict, if any such interest is shown; their knowledge of the facts in relation to which they have testified, their opportunity for seeing, hearing or knowing those facts, the probability of the truth of their testimony, their bias or prejudice, or the absence of either of these qualities, and all other facts and cir-

cumstances given in evidence or surrounding the witnesses at the trial.

A certain claim presented to the city of Pullman has been offered in evidence here; and you are only authorized to consider that claim in so far as it may tend to contradict the testimony of the plaintiff given upon the witness-stand. It has no bearing on the recovery and does not limit the amount of recovery. But if the statements contained in that statement are inconsistent with the testimony of the witness on the stand you have a right to consider that fact in weighing her testimony.

If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you find for the plaintiff.

I think probably you understand the issues in the case now from what I have said to you. The first question in the case is: Was this walk constructed by the company for the use of foot-passengers or with knowledge of the fact that it would be used by foot-passengers? If it was, at the time of its original construction, was it reasonably safe for that purpose under all the circumstances? If you find both of these issues against the defendant then the plaintiff is entitled to recover unless she was guilty of contributory negligence.

The burden of proof is upon the plaintiff to make out the [86] negligence charged by a preponderance of the testimony; and the burden of proof is upon the defendant to make out the charge of contributory negligence.

It is necessary to say that if you find that this walk was constructed by the defendant for the use of its own employees only and was not intended for the use of the public and the railway company did not know that it was being so used, then it has violated no duty it owed to the plaintiff, and your verdict will be for the defendant.

I have already stated to the jury that if the injury was caused solely through the accumulation of ice and snow on the walk there is no liability on the part of the railway company because it was under no obligation to remove such obstruction.

You may now retire.

Mr. HAMBLEN.—Before the jury retires I desire to take exceptions to the instructions.

Mr. PLUMMER.—We have no exceptions.

Mr. HAMBLEN.—In order to make the record we will except to Instruction No. 1 which was refused.

We will except to the refusal of the Court to give Instruction No. 3 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 4 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 6 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 7 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 8 requested by the defendant.

We except to the refusal of the Court to give Intion No. 9 requested by the defendant. **[87]**

We except to the refusal of the Court to give Instruction No. 11 requested by the defendant.

We except to that instruction given by the Court in regard to the construction of the sidewalk by the defendant, Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the boards adjacent thereto referred to in the evidence.

The defendant excepts to the instruction of the Court in regard to the earning capacity of the plaintiff for the reason that there is no evidence of any kind offered to show what the earning capacity of the plaintiff was and there is nothing for them to claim any damages upon this question of the case.

Whereupon the jury retired to consider of their verdict. **[88]**

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess the amount of her recovery at three thousand seven hundred and fifty dollars ($3,750).

(Signed) J. D. CASEY,
Foreman.

[Endorsements]: Verdict. Filed September 24, 1918. W. H. Hare, Clerk. [89]

[Title of Court and Cause.]

Judgment.

This cause having heretofore come on for trial before the Court and a jury, and the cause having been submitted to the jury by the Court, and thereafter said jury returned into court their verdict awarding the plaintiff the sum of thirty-seven hundred and fifty dollars ($3750);

Now, therefore, upon the verdict of said jury and the evidence and proceedings in said cause.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, A. D. Branham, do have and recover of and from the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, the sum of thirty-seven hundred and fifty dollars ($3750), and costs to be hereafter taxed.

Done in open court this 25th day of September, A. D. 1918.

(Signed) FRANK H. RUDKIN,
Judge [90]

[Title of Court and Cause.]

Motion for Judgment Notwithstanding Verdict of the Jury.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and pursuant to stipulation entered into between

counsel for the respective parties, with the consent of the Court, and prior to the giving of instructions to the jury by the Court, by which stipulation it was agreed that in event the Court deny the motion of the defendant for a directed verdict the defendant might renew questions raised by such motion and the Court finally pass upon them by motion for judgment notwithstanding the verdict, moves the Court for judgment in favor of the defendant in the above-entitled cause notwithstanding the verdict of the jury returned in said cause in favor of the plaintiff and against the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant. **[91]**

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and in event the motion of the defendant for judgment notwithstanding the verdict, is denied by the Court, moves the Court for a new trial herein for the reasons and upon the grounds, following:

1. Excessive damages appearing to have been given under influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdict of the jury and that it is against the law.

3. Error in law occurring at the trial and ex-

cepted to at the time by the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant. [92]

[Title of Court and Cause.]

Order Denying Motion for New Trial and Motion for Judgment Non Obstante Veredicto.

This cause coming on for hearing upon the defendant's motion for a new trial, and upon defendant's motion for judgment notwithstanding the verdict of the jury (the latter having been interposed according to stipulation entered into at the time of the submission of the said cause to the jury), and the Court being fully advised in the premises, and having considered said motions, and each of them, and the argument of counsel;

IT IS ORDERED that defendant's motion for a new trial, and the motion for judgment notwithstanding the verdict, be, and each of the same are hereby denied.

Done in open court this 18th day of November, 1918.

(Signed) FRANK H. RUDKIN,
Judge.

Exception taken by defendant and exception allowed by the Court. [93]

[Title of Court and Cause.]

Motion for Extension of Time in Which to File and Present Bill of Exceptions.

Comes now the defendant by its attorneys, A. C. Spencer and Hamblen & Gilbert, and moves the Court for an order herein extending the time within which defendant may file its bill of exceptions, for thirty (30) days from the date of filing the order denying motion for judgment notwithstanding the verdict, and motion for new trial.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant. [94]

[Title of Court and Cause.]

Order Extending Time in Which to File and Present Bill of Exceptions.

The motion of the defendant for additional time within which to present and file its bill of exceptions, coming on for hearing and the Court being fully advised in the matter,—

Now, therefore, IT IS ORDERED that the defendant have thirty (30) days from the filing of the order denying motion for new trial and motion for judgment notwithstanding the verdict, in which to file and present its bill of exceptions in the above cause.

To which plaintiff excepts and exception allowed.

Dated this 18th day of November, A. D. 1918.

(Signed) FRANK H. RUDKIN,

Judge.

Copy of within received, plaintiff objecting to service on ground not served in time as per order of court, or as provided by Rules of Court.

Dated December 16, 1918.

PLUMMER & LAVIN,

Attorneys for Plaintiff.

[Endorsements]: Bill of Exceptions. Lodged in the U. S. District Court for the Eastern District of Washington. December 16, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. Filed January 29, 1919. W. H. Hare, Clerk. **[95]**

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now, on this 27th day of January, A. D. 1919, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, and the defendant appearing by Messrs. Hamblen & Gilbert, its attorneys, and the plaintiff appearing by Mr. John Salisbury and Messrs. Plummer & Lavin, her attorneys, and it appearing to the court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by the order of the Court, and that no amendments have been suggested by the plaintiff, and that the time for settling said bill of exceptions has not expired; and it further ap-

pearing to the Court that said bill of exceptions contains all of the material facts occurring on the trial of said cause, together with exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits offered and received in evidence, and which exhibits are hereby made a part of said bill of exceptions, the same being Exhibits No. 1, 2, 3, 4, 5, 6, 7 and 8, and the clerk of this court is hereby ordered and instructed to attach the same to said bill of exceptions;

THEREFORE, upon motion of Messrs. Hamblen & Gilbert, attorneys for defendant, it is hereby ordered that said proposed bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified **[96]** accordingly by the undersigned, Judge of this Court, who presided at the trial of said cause; that it conforms to the truth, and that it is in proper form and that it is a full, true and correct bill of exceptions and the clerk of the court is hereby ordered to file the same as a record in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Settling Bill of Exceptions. Filed January 29, 1919. W. H. Hare, Clerk. **[97]**

[Title of Court and Cause.]

Motion to Strike Pretended and So-called Proposed Bill of Exceptions.

Comes now the plaintiff above named, and moves the Court for an order striking from the records, files and proceedings herein defendant's so-called and pretended proposed bill of exceptions in this cause, for the reasons:

I.

That under the rules of this court, and of the District of Washington, defendant was required to present to the clerk of this court its proposed Bill of Exceptions within ten (10) days after the verdict of the jury in said cause, the said cause being tried by jury, and verdict having been rendered on September 24th, 1918, and that defendant did not present or file any proposed bill of exceptions in said cause, nor secure or attempt to secure any extension of time within which to present, serve or file any proposed bill of exceptions herein, until on, to wit, the 18th day of November, 1918, defendant petitioned this court for an order extending the time for a period of thirty (30) days within which to prepare, file and serve a proposed bill of exceptions herein, and that neither at the time of the presentation of said petition, nor at any other time, did defendant make any showing upon the merits, or give any reason why said proposed bill of exceptions had not been prepared, filed and served within the time required by the rule of court; that plaintiff at said time resisted said application for extension of time upon the

ground that the time [98] had already expired, and that the Court had no jurisdiction or power to grant said extension; and the Court granted said motion as petitioned for, but at said time said court observed that he did not believe that the order was of any force or value in view of the fact that the time had already expired, and plaintiff excepted to the order as entered, which exception was allowed by the Court; that defendant's proposed and so-called bill of exceptions was served upon plaintiff's attorneys on December 16th, 1918, and plaintiff contends that the Court had no power or authority to grant said extension of time when the time had already expired, or to make any order extending said time.

II.

That there is no legal, valid or proper bill of exceptions on the part of the defendant herein, prepared, served or filed in said court, as provided by the rules of this court.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Service admitted this 23d day of December, 1918.

HAMBLEN & GILBERT,
Attorneys for Defendant.

[Endorsements]: Motion to Strike Proposed and So-called Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, December 24, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [99]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

The defendant in the above-entitled cause feeling itself aggrieved by the rulings of the Court and the judgment entered on the 25th day of September, A. D. 1918, complains in the record and proceedings had in said cause and also to the rendition of the judgment in the above-entitled cause in said United States District Court, against said defendant on the 25th day of September, 1918; that manifest error hath happened to the great damage of said defendant, petitions said Court for an order allowing the said defendant to prosecute a writ of error in the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings of this court be suspended and stayed until the said determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner will ever pray.

Dated this 14th day of March, A. D. 1919.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Service of the within petition is hereby acknowledged this 14th day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Petition for Order Allowing Writ of Error. Filed March 21, 1919. W. H. Hare, Clerk. [100]

[Title of Court and Cause.]

Assignments of Error.

Comes now the defendant and files the following Assignments of Error upon which it will rely in the prosecution of the writ of error in the above-entitled cause, from the judgment made by this Honorable Court upon the 25th day of September, 1918, in the above-entitled cause:

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant for a nonsuit immediately at the conclusion of the introduction of evidence by the plaintiff, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That defendant has not been shown to have been guilty of any negligence or breach of any duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of the plaintiff herself, or by the negligence of some other person or party for which this defendant was not responsible, and not by reason of any negligence on the part of the defendant or any of its employees.

4. That under the contract with the City of Pull-

man, by which defendant had been performing certain work in connection with the reconstruction of the bridge referred to in the complaint of [101] the plaintiff, there was no duty, expressed or implied, on the part of the defendant in connection with the use of said bridge by the plaintiff, or the public of which the plaintiff was one, and that the defendant was not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to judgment of dismissal upon its motion.

II.

That the Court erred in denying defendant's motion for a directed verdict in favor of the defendant immediately at the close of all of the evidence, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That the defendant had not been shown to have been guilty of any breach of duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of plaintiff herself and not by reason of any negligence on the part of the defendant.

4. That under the contract with the City of Pullman by which the defendant had been performing certain work in connection with the reconstruction of the bridge referred to in the complaint of the plaintiff there was no duty, expressed or implied, on

the part of the defendant in connection with the use of said bridge by which the plaintiff, or the public of which the plaintiff was one, and that defendant was not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to a verdict on the evidence, by the direction of the Court.

III.

That the Court erred in denying defendant's motion for **[102]** judgment notwithstanding the verdict (counsel for the respective parties having stipulated that such motion might be made and passed upon by the Court), upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant; that if the negligence of any party contributed in any way to the injury of plaintiff, it was not the defendant company, but was the City of Pullman or the contributory negligence of the plaintiff herself.

2. That the evidence showed that the plaintiff was guilty of contributory negligence which was the cause of the injury complained of.

IV.

That the Court erred in denying the defendant's motion for new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdit of the jury and that it was against the law.

3. Error in law occurring at the trial and ex-

cepted to by the defendant.

V.

That the Court erred in giving and refusing the instructions to the jury, in the following particulars:

1. The Court erred in refusing to give instruction No. 1, requested by the defendant, as follows:

"Instruction No. 1: I instruct you to return a verdict in this case in favor of the defendant," which refusal was excepted to before the jury retired, as follows: "We except to the refusal of the Court to give instruction No. 1 requested by the defendant."

2. The Court erred in refusing to give instruction No. 3 requested by the defendant, as follows: [103]

"Instruction No. 3. From the mere fact that an accident happened and plaintiff was injured you are not to infer negligence on the part of the defendant, but the presumption is that the defendant was exercising due care at all times and the burden is upon the plaintiff to overcome this presumption by a preponderance of all of the evidence in the case." To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 3 requested by the defendant."

3. The Court erred in refusing to give instruction No. 4, requested by the defendant, as follows:

"Instruction No. 4. I instruct you that the reconstruction and repair of the bridge along Kamiakan Street in the town of Pullman by the defendant, Oregon-Washington Railroad & Navigation Company, was undertaken by said defendant under and pursuant to a contract in writing entered into between the Town of Pullman and the defendant,

Oregon-Washington Railroad & Navigation Company, by the terms of which the said Town of Pullman expressly agreed to keep the said street and bridge closed during the said period of repair and reconstruction. Therefore, if you find from the evidence that the town of Pullman failed to close the said bridge in accordance with the terms of the contract above referred to and permitted the same to be used by the public during the said period of repair and reconstruction and if you further find from the evidence that by reason of the failure of said town of Pullman to so close the said bridge that plaintiff entered upon the same and while on the same or a part thereof slipped and fell and was injured, then you are instructed that this defendant is not liable therefor and your verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 4 requested by the defendant."

4. The Court erred in refusing to give instruction No. 6 **[104]** requested by the defendant, as follows:

"Instruction No. 6. I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalks on said bridge over and along Kamiakan Street, and you further find that the accident to the plaintiff from which she sustained her injuries complained of was due as much to the

slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 6, requested by the defendant."

5. The Court erred in refusing to give instruction No. 7, requested by the defendant, as follows:

"Instruction No. 7. The Court instructs you that the plaintiff, Mrs. Branham, was required under the law to use ordinary care in passing over the sidewalks of the town of Pullman, and the walk on the bridge in question, and if you find from the evidence that the sidewalk of the town of Pullman in question was defective and in a dangerous condition due to the negligence of the defendant at the time and place of the accident, you will next proceed to determine whether plaintiff at said time and place was exercising ordinary care.

"By ordinary care is meant the care which an ordinarily prudent person would use in travelling over the sidewalks of the city, and if you find from the evidence that Mrs. Branham at the time and place of the accident was not using ordinary care in travelling over the said sidewalks of the city, as I have defined [105] the meaning of the words, ordinary care, then you must find for the defendant, notwithstanding that you might believe from the evidence that the defendant at the time and place of the

accident was negligent in some particular complained of by the plaintiff; provided further you find from the evidence that the want of care of Mrs. Branham in travelling over the sidewalk at the time and place of the accident contributed proximately to her accident and the injury resulting therefrom."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 7, requested by the defendant."

6. The Court erred in refusing to give instruction No. 8 requested by the defendant, as follows:

"Instruction No. 8. I instruct you that if either the knowledge of the condition of the sidewalk or the place upon which Mrs. Branham slipped and fell, or the fact that she was wearing at the time improper shoes with which to go upon a walk the condition of which she knew, was the primary cause of the accident, she was guilty of contributory negligence and cannot recover and the verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 8, requested by the defendant."

7. The Court erred in refusing to give instruction No. 9, requested by the defendant, as follows:

"Instruction No. 9. I instruct you that when a person knows of a dangerous sidewalk, or a sidewalk in a dangerous condition, the law requires her to exercise such reasonable care as the ordinarily prudent and cautious person would use under like circumstances. If this is done and injury results, the person is without fault and if you find this to be the case,

then Mrs. Branham was not guilty of contributory negligence. If this were not done and the [106] failure so to do proximately contributed to the injury sustained by Mrs. Branham, then she would be guilty of contributory negligence and could not recover.

"The question of whether upon all facts in the case as disclosed by the evidence, Mrs. Branham was or was not guilty of contributory negligence, is one for your determination.

"If from the evidence you find that she was guilty of contributory negligence and such negligence on her part was the proximate cause of the injury sustained by her, then you shall find for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 9, requested by the defendant."

8. The Court erred in refusing to give instruction No. 11 requested by the defendant, as follows:

"Instruction No. 11. I instruct you that the undisputed evidence in this case is to the effect that barriers were placed at the north end of the bridge and sidewalk extending clear across the same.

"I further instruct you that the undisputed evidence is that in order to go upon the sidewalk on which plaintiff fell, she was required to pass around the end of the barrier so placed.

"I further instruct you that if you find that in so doing she did not exercise ordinary care, as heretofore defined in these instructions, then you will find her guilty of contributory negligence and your verdict shall be for the defendant. The fact that other

persons had travelled the street and taken the risk incident to going upon the walk in the condition in which it was, does not change the rule herein laid down. There are always persons who take risks if a short cut can be made and who will go upon a street even if it is obviously not open to public travel.''

To which counsel made the following exception: ''We will **[107]** except to the refusal of the Court to give instruction No. 11, requested by the defendant.''

9. The Court erred in instructing the jury as follows:

''If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot-passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

''If you find that the Railway Company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she

herself was guilty of contributory negligence."

To which the defendant excepted as follows: "We except to the instruction given by the Court in regard to the construction of the sidewalk by the defendant Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the portion adjacent thereto referred to in the evidence."

10. The Court erred in instructing the jury as follows:

"If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no **[108]** testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you will find for the plaintiff."

To which defendant excepted as follows: "The defendant excepts to the instruction of the Court in regard to the earning capacity of the plaintiff, for the reason that there is no evidence of any kind offered to show what the earning capacity of the plaintiff was and there is nothing for them to claim any damages upon this question of the case."

VI.

The Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

WHEREFORE, the said Oregon-Washington Railroad & Navigation Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed and that said District Court be directed to grant said defendant a new trial in said action.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error (Defendant in Lower Court).

Service of the within Assignments of Error is hereby acknowledged this 14th day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Assignments of Error. Filed March 21, 1919. W. H. Hare, Clerk. **[109]**

[Title of Court and Cause.]

Order Fixing Amount of Bond on Writ of Error.

The defendant, Oregon-Washington Railroad & Navigation Company, having this day filed its petition for a writ of error from the rulings, decisions and judgment made and entered in said action, to the United States Circuit Court of Appeals in and for the Ninth Circuit, together with the assignments of error within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error and that upon the giving of said security, all fur-

ther proceedings in said court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit; and said petition having been this day duly allowed:

Now, therefore, IT IS ORDERED, that upon the said defendant the Oregon-Washington Railroad & Navigation Company filing with the clerk of this court a good and sufficient bond in the sum of $5,000 to the effect that if the said Oregon-Washington Railroad & Navigation Company, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals. **[110]**

Dated this 19th day of March, A. D. 1919.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within order fixing amount of bond is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Order Fixing Amount of Bond on Writ of Error. Filed March 22, 1919. W. H. Hare, Clerk. **[111]**

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, the Oregon-Washington Railroad & Navigation Company, a corporation, as principal, and National Surety Company of New York, a corporation, as surety, are held and firmly bound unto A. D. Branham, in the full sum of $5,000, to be paid to the said A. D. Branham, for which payment, well and truly to be made, we bind ourselves and our and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 19th day of March, A. D. 1919.

WHEREAS, lately at the September term of the year 1918, of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between A. D. Branham, plaintiff, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, a final judgment was rendered against the said defendant, and the said defendant, Oregon-Washington Railroad & Navigation Company, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said A. D. Branham is about to be issued, citing and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such that **[112]** if the said Oregon-Washington Railroad & Navigation Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) OREGON-WASHINGTON RAILROAD & NAVIGATION CO.
By A. C. SPENCER,
HAMBLEN & GILBERT,
Its Attorneys.

[Corporate Seal]

NATIONAL SURETY COMPANY,
By JAMES A. BROWN,
Its Resident Vice-President.
Attest: F. S. JONES,
Its Resident Asst. Secretary.

The foregoing bond is approved as to form, amount and sufficiency of surety, this 19th day of March, A. D. 1919.

(Signed) FRANK H. RUDKIN,
Judge of the United States District Court, Eastern District of Washington.

Service of the within Bond is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Bond on Writ of Error. Filed March 22, 1919. W. H. Hare, Clerk. **[113]**

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of A. C. Spencer and Hamblen & Gilbert, attorneys for the defendant, and upon filing a petition for writ of error and assignments of error:

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at the sum of $5,000, which said bond may be executed by said defendant, as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted pending the determination of such writ of error.

Dated this 19th day of March, A. D. 1919.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within order allowing writ of error is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Order Allowing Writ of Error. Filed March 21, 1919. W. H. Hare, Clerk. **[114]**

[Title of Court and Cause.]

Writ of Error.

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the September, 1918, term thereof, between A. D. Branham, plaintiff, and the Oregon-Washington Railroad & Navigation Company, defendant, a manifest error hath happened to the said Oregon-Washington Railroad & Navigation Company, plaintiff in error, as by its complaint appears;

We being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 18th day of April next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to

correct that error, what of right, and according to the laws and customs of the United States [115] should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 19th day of March, 1919, of the Independence of the United States the one hundred forty-fourth year.

[Seal] (Signed) W. H. HARE,

Clerk of the District Court of the United States for the Eastern District of Washington.

Allowed by

(Signed) FRANK H. RUDKIN,

District Judge.

Service of the within Writ of Error is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,

Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Writ of Error. [116]

[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States to A. D. Branham and to Messrs. Wm. H. Plummer, Joseph Lavin and John Salisbury, Her Attorneys, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California,

within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein A. D. Branham is plaintiff and you are defendant in error, and the Oregon-Washington Railroad & Navigation Company is the defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 19th day of March, 1919, and the Independence of the United States, the one hundred forty-fourth year.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

[Seal] Attest: (Signed) W. H. HARE,
Clerk. **[117]**

Service of the within Citation on Writ of Error is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Citation on Writ of Error. **[118]**

[Endorsed]: No. 3322. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad and Navigation Company, a

Corporation, Plaintiff in Error, vs. A. D. Branham, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed March 31, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

A. D. BRANHAM,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

Stipulation as to Printing of Record.

IT IS HEREBY STIPULATED, by the plaintiff in error by its attorneys, and by the defendant in error by her attorneys, that in printing the record in the above-entitled cause, the clerk shall cause the following to be printed for the consideration of the Court of Appeals:

Amended Complaint.

Answer to Amended Complaint.

Reply.

Verdict.

Defendant's Motion for Judgment Notwithstanding Verdict.

Defendant's Motion for New Trial.

Order Denying Motion for Judgment Notwithstanding Verdict.

Order Denying Motion for New Trial.

Judgment.

Bill of Exceptions and Order Settling.

Motion to Strike Pretended and So-called Bill of Exceptions.

Petition for Writ of Error.

Assignments of Errors.

Bond on Writ of Error.

Order Fixing and Allowing Bond.

Order Allowing Writ of Error.

Citation on Writ of Error.

Writ of Error.

Stipulation as to Making Up Record.

IT IS FURTHER STIPULATED, that in printing the said record, there may be omitted therefrom the title of the court and cause on all papers, excepting the first page, and that in lieu of said court and cause there be inserted in the place and stead thereof the following words, "Title of Court and Cause."

Dated this 22d day of March, A. D. 1919.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error and Defendant.

JOHN SALISBURY,
PLUMMER & LAVIN,
Attorneys for Defendant in Error and Plaintiff.

[Endorsed]: No. 2981. In the District Court of the United States for the Eastern District of Washington, Northern Division. A. D. Branham, Plaintiff, vs. O.-W. R. & N. Co., a Corp., Defendant. Stipulation. Filed March 24, 1919. W. H. Hare, Clerk. By ————, Deputy.

No. 3322. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 31, 1919. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
For The Ninth Circuit

OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,
vs.
A. D. BRANHAM,
Defendant in Error.

Upon Writ of Error to the District Court of the United States for the Eastern District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

PLUMMER & LAVIN,
JOHN SALISBURY,
Spokane, Washington,
Attorneys for Defendant in Error.

THE FRANKLIN PRESS, SPOKANE

FILED
MAY 12 1919
F. D. MONCKTON,

United States
Circuit Court of Appeals
For The Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,

vs.

A. D. BRANHAM,
Defendant in Error.

Upon Writ of Error to the District Court of the United States for the Eastern District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

MOTION TO STRIKE BILL OF EXCEPTIONS.

Comes now the Defendant in Error and moves the court to strike from the records of this cause, the Bill of Exceptions herein, upon the following grounds:

1.

That the same was not lodged with the Clerk of the District Court within ten days after the verdict and judgment in this cause, pursuant to Rule 75 of the Revised Rules of the United States Circuit Court and the United States District Court of the District of Washington.

2.

For the reason that the District Judge had no power, jurisdiction or authority to extend the time for the filing, serving or delivering to the Clerk, the Bill of Exceptions proposed by Plaintiff in Error.

Defendant in Error further moves the court to affirm the judgment of the District Court.

PLUMMER & LAVIN,
JOHN SALISBURY,
Attorneys for Defendant in Error.

ARGUMENT.

The verdict of the jury was returned on September 24th, 1918, and the judgment was entered on September 25th, 1919 (Tr. 106). No action was taken by Plaintiff in Error by way of preparing, serving, filing or lodging with the Clerk a proposed Bill of Exceptions until November 18th,

1918, and after the ten days provided by rule had expired, on which date Plaintiff in Error applied to the Judge of the District Court for an order "extending the time within which Plaintiff in Error may file its Bill of Exceptions, for a period of thirty days from the date of the filing of the order denying the motion for Judgment Non Obstante and Motion for New Trial" (Tr. 109). No showing of any kind was made in support of the application. Thereupon, on the 18th day of November, 1918, over the objection of Defendant in Error, the Court made an order granting said application (Tr. 109), a copy of which was delivered to Defendant in Error, and objection to service of the same was entered and made upon the ground that it was contrary to the rule of court (Tr. 110). A proposed Bill of Exceptions was lodged with the Clerk of the court on November 16th, 1918. On December 24th, 1918, and before the order was made by the Court, settling the proposed Bill of Exceptions, Defendant in Error served and filed a Motion to strike the proposed Bill of Exceptions upon the grounds which are fully stated at pages 112 and 113 of the Transcript. Rule 75 of the rules in force in this District (see Revised Rules of the United States Circuit Court and the United States District Court of the Dis-

trict of Washington) provides as follows:

> "The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial, *within ten days after the rendition of the verdict* * * * serve upon the adverse party a draft of the proposed Bill of Exceptions."

At the time the court made the order enlarging the time for lodging the proposed Bill of Exceptions with the Clerk of the court, the court said:

> "I do not believe that the order is of any force or value in view of the fact the time has already expired." (Tr. 112-113.)

In this connection, it might occur to your Honors, what injury has been done Defendant in Error on account of the extension of time being granted; and the court might feel that if there was no injury done, that although the granting of the extension of time was without authority or jurisdiction, if there was no injury done the Defendant in Error, and no advantage accruing to Plaintiff in Error by reason thereof, that this court might disregard the irregularity. We think, however, that the purpose of the rule was to require a Bill of Exceptions to be lodged with the Clerk within ten days after verdict or judgment, on account of the fact that the Judge would have the testimony, the instructions and exceptions fresh in mind, and no official stenographer being authorized

to take the testimony, the court would have to rely upon its notes and memory should a dispute arise as to what had occurred during the trial, whereas, by extending the time indefinitely, disputes would arise between the parties as to what had occurred during the trial. Therefore, the purpose of the rule is apparent, and that is the reason for the ten days' limitation, and while the court has power to extend the time, if application therefor is made *before the time has expired* as provided for by the rule, it can refuse to do so, and should refuse to do so unless a showing is made upon which the extension is requested. By the order which was made by the court extending the time for the filing of the Bill of Exceptions herein, the Defendant in Error was prevented from proposing any amendments, because, if she had done so, according to the weight of authority, she would have waived her right in this court and the lower court to move to strike the proposed Bill of Exceptions. The authorities seem to agree that if amendments are proposed, the violation of the rule as to time is waived. Therefore, we were compelled to submit to having the present Bill of Exceptions signed and certified without correcting the numerous errors contained therein, by way of amendments. We take it that this is a rule of practice which means something, and if a party

can wait for a month after the ten days has expired before they apply for an extension of time or lodge with the Clerk their proposed Bill of Exceptions, then the rule of practice might as well be wiped out, and everything run upon a "hap-hazard" principle. In the case of Alverson vs. O. W. R. & N. Co., decided by this court on Sept. 5th, 1916, 236 Fed. 331, the plaintiff did not take any exceptions to the instructions of the court while the jury was at the bar, as provided by the common law practice and the rule of court. In that case, both parties signed a stipulation, giving plaintiff thirty days within which to file exceptions to the instructions of the court, and, it will be observed, that the same counsel appeared in that case as appear in the case at bar, and counsel for the railway company contended in that case, the same as we now contend in this case. Counsel went further in that case, and after signing a stipulation granting an extension of time beyond the time provided by the rule, they repudiated that stipulation and argued that it was void, and that the court had no power to permit taking said exceptions at any other time than that provided by the rules, that is, while the jury was at the bar. It seems to us that if the court is going to enforce the rule as announced in the Alverson case against

us and in favor of the same counsel, it should, in this case, enforce the rule we contend for against the same counsel.

STATEMENT OF THE CASE ON THE MERITS.

(We shall designate the parties as Plaintiff and Defendant, the same as they were designated in the lower Court.)

Some time prior to February 4th, 1916, there existed in the city of Pullman, Washington, a certain bridge across a creek. This bridge was adjacent to or was part of a roadway that crossed over the rights of way of the Northern Pacific Railway Company and that of the defendant. By some arrangement with the city of Pullman, the defendant was engaged in the rebuilding or rehabilitation of this bridge, and had been so engaged, and in charge of the bridge, through its workmen and superintendents for several months prior to the accident to plaintiff, which occurred on February 4th, 1916. The contract between the city and the defendant provided, among other things, that the city should have the bridge closed to traffic during its reconstruction but the same was not closed either by the defendant or the city, and, during all of the time in question, so far as the use of the same by pedestrians was concerned, both parties

seemed to have disregarded and waived that part of the contract. From the record it appears that the bridge was constructed, as most bridges of that character are, with a driveway through the center for the use of vehicles, and sidewalks upon either outer side for the use of pedestrians, and at the time of the accident a railing extended along the sides of the bridge, and along parallel with the walkway on the south end of the bridge, up to within about twenty or thirty feet of the south end. During the reconstruction of the south end of the bridge, the defendant had placed a plank walk for the public extending from the south approach to the bridge extending northerly over to where the railing again commenced, and to a point where the sidewalk remained intact on the north end thereof. Apparently, and to all intents and purposes, these planks were laid for the purpose of permitting the passage of pedestrians from the railway stations, and from the south part of the city, over to the central portion of the city, or the business district. During all of this time, after the planks were laid by the defendant, from 300 to 500 people would pass over the bridge daily, along the planks in question and over upon the walkway on the south end of the bridge. The bridge was situated in the center of the business

district and the street in question was used and traveled more than any other street in the city. Either the city or the defendant had erected a barrier, extending from the east edge of the improvised walkway, or the west edge of the driveway across the driveway easterly for the purpose of preventing vehicles from going upon or crossing the bridge, for the reason that there was no extension of the *driveway* portion of the bridge provided from the portion under reconstruction over to the solid ground. This barrier only ran to the edge of the walkway, but in no wise did it act as a barrier across the walkway so far as traffic by pedestrians was concerned. Witness Pinkley testified upon cross examination by defendant's counsel as follows:

> "There was a barrier across the right of way at the north (south) end of the bridge * * *. I believe there was one rail. If I remember right, extended *from* the sidewalk."
>
> "Q. And how did pedestrians get up on the sidewalk on the bridge past that barrier?
>
> A. Well, I know how I did. I swung around the barrier on the end.
>
> Q. Just step down here to the front of the jury and show—
>
> MR. PLUMMER: There is no dispute about that, Mr. Hamblen, they all walked around the barrier.
>
> A. I saw this Exhibit One before up in

Mr. Plummer's office. Possibly the barrier extended *to the east line of the sidewalk here,* I would not say. I would say that it did not go clear to the line. (Meaning the west edge of the improvised walk.) I would say that it stopped within a foot of the line. It stopped within a foot of the east line at this point marked "Y" about there. In coming down from the north going southerly along there and swinging around this barrier *I do not believe it was necessary to get off of the sidewalk at all before reaching these planks."* (Tr. 35.)

Witness Reed testified as follows (Tr. 23):

"Q. For three weeks previous (to the accident) were there any barriers on the sidewalk, on the south end of the approach across the end of the sidewalk, on the south end of the bridge, during all of the time that you speak of?

A. There was nothing there at any time that I know of that would hold them to go through, *but the barrier was across the south end of the driveway, and the openings were left open for foot passengers just the same as ever."*

This same witness testified on cross examination:

"Q. Now will you just step down here again and look at this Exhibit One and show the jury just where this obstruction or barrier that you referred to was placed with reference to the north end of the bridge here?

A. It was right at the edge here, the railing across there that would keep the people from there was right at the edge there, at the end of the sidewalk, and extended clear *to the east line* of the sidewalk. There was no notice given there on that barrier to warn people,

> not to cross there that I know of except at night there would be a red light in here, in the middle of the bridge." (Tr. 25.)

From this testimony it appears that the barrier was put across the driveway for vehicles, and probably extended over the edge of the driveway a few inches, so that people walking on the planks would swing their body around the end of this barrier, at the same time keeping upon the sidewalk which the company had provided. Work had been suspended upon the bridge by the defendant for a few days on account of bad weather, but the bridge had not been turned over to the city and was still being constructed under the contract with the city, and was still under the control of the defendant at the time of the accident. The planking which had been laid by the defendant were used constantly by the public, and a well-beaten pathway was apparent upon the same. There was no barrier across the north end of the sidewalk which connected with the improvised walk, which clearly indicated, that the walk for pedestrians. and the one built by the company for temporary use, were still open to the public, and the public was impliedly invited to use the same. If the company had not provided the planking, and laid them as they were laid, the public could not cross the bridge at all until the same was completed. The planks

were not nailed or fastened in any manner, and would "wabble" about and become more or less misplaced by use by the traveling public. On February 4th, 1916, at about 6 o'clock, P. M., and it being dark at the time, the plaintiff, who had formerly lived at Pullman, but who had been away for several years, attempted to use the walkway constructed by the defendant for the purpose of crossing the bridge on her way from the home of her brother-in-law to the central portion of the city, following the foot traffic ahead of her and using this street, it being a public thoroughfare. A light snow had fallen the night before which had obscured the hole or space existing between the planks in question, and while walking upon the planks, she slipped, and her foot went into an opening between the planks, and she fell over, her foot and ankle catching between the planks, and she sustained a serious injury to her back, her ankle was broken, resulting in what the physicians who testified characterized as a Pott's fracture of one of the ankle bones, and another bone was "chipped" off near the ankle joint. This action was brought to recover damages for the injuries negligently inflicted, resulting in a verdict in the sum of $3750.00, upon which judgment was rendered, and from this verdict and judgment defendant has taken this writ of error.

ARGUMENT.

Defendant, in its brief, has made the mistake that is usually made in this class of cases, by quoting that part of the evidence which appears *most favorable* to the defendant, and remaining silent as to that portion of the evidence most favorable to the plaintiff. This Court has frequently enunciated the rule which has been enunciated by practically all of the courts, that upon demurrer to the evidence, or upon motion for *judgment non obstante veredicto,* which is the same thing, the evidence most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, which tend to support the plaintiff's claim, shall only be considered by the appellate court, and we are now only called upon to determine whether or not there is any evidence, or any reasonable inferences to be drawn therefrom, tending to prove the legal liability of defendant for the injuries sustained by the plaintiff. The railway company was an independent contractor, and independent of any contract which it may have had with the city, it cannot escape its liability for injuries sustained by a third party due to its negligence. Therefore, the defendant's contract with the city is wholly immaterial, except to show that the defendant had charge of the rebuilding of the bridge,

and all that was done in and about its rebuilding was done and performed by the defendant, and it would be liable for any injury resulting from its negligence, so far as a third person was concerned, just the same as the city would be if it had been carrying on this work as a municipality, and it is wholly immaterial as to whether or not the city would also be liable for permitting a dangerous structure to be erected and maintained, and invite the public to use the same as a thoroughfare. The city and the defendant were undoubtedly joint tort feasors, and either, or both, are liable. In this case the company was primarily liable, and the liability of the city was secondary.

Defendant makes some very startling statements in its brief from which we quote as follows:

> "The plaintiff in error which hereafter we will refer to as the railroad company, was under no obligation to protect the public against the dangers incident to the use of the said bridge *unless the railroad company knew that the public was using it* and that the city was failing to perform its obligation under the contract referred to. There isn't a suggestion of any evidence that the railroad company had any notice, nor is there any evidence that during the entire period that said work was suspended that the railroad company knew anything of the dangerous condition of said bridge, or that the public was using or attempting to use *any part of the temporary structure placed there by the railroad com-*

> *pany.* In fact, there was no evidence offered by the plaintiff to show that the planking upon which Mrs. Branham fell, was placed there by the railroad company."

The evidence does show that the defendant had charge of this work, and that it had not turned the bridge over or permanently suspended operations there until a long time after the accident, and after the bridge was completed. When counsel say that the company was under no obligation to protect the public "against the dangers incident to the use of the bridge unless the company knew that the public was using it, and that the city was failing to perform its obligations under the contract," this is an admission that if the company *did know,* it *was under obligation* to protect the public from injuries resulting therefrom. It was in charge of the bridge and the work being carried on there. It placed the planking down there, apparently for the use of the traveling public. It knew how the planking had been placed. and knew whether the planking had been fastened, or otherwise, and whether it was reasonably safe for the use for which it was apparently intended. Five hundred people were using the walkway daily, and the company cannot shut its eyes to the fact of its condition or use. The jury in this case had a right to infer, from all of the surrounding

circumstances that the company did have such knowledge and notice and took no steps to remove the danger or erect a barrier across it. Counsel further say that there was no evidence that the defendant placed the planking at the point where the plaintiff was injured. Witness Reed testified it was bridge planking, the same as had been used in and about the bridge, and was placed there while the company had charge of the bridge construction, but witness Hooper, called as a witness in behalf of the defendant, testified as follows:

> "I am street commissioner of the city of Pullmen. * * * but the sidewalk had been taken out by the bridge crew, that is, the railroad crew, and they had laid some three by twelve lengths (planks) paralleling where the old sidewalk used to be in the place of the sidewalk, and the pedestrians were traveling on the left hand side of that, and at the end of this bridge plank over there there was three more planks laying across to catch the bridge, so the pedestrians could use that to cross." (Tr. 79.)

On page 83 of the record he testified upon cross examination as follows:

> "The plank lay across from that bridge over to here for them to go on. *The bridge crew laid the planks there.* The plank that the people were supposed to walk on *were laid there by the bridge crew* (of defendant) *so that people could get onto this bridge from this street across to here.*"

Therefore, it must be conceded, that the company having charge of this bridge, and that it laid the plank as a continuation of the regular traveled portion of the bridge used by pedestrians on the southwest end thereof clear up to the solid ground, and holding open and inviting the public to use the same as a foot passageway, the company was under obligation to so erect and construct this walkway so that the same would be reasonably safe for the use to which it was being put upon the implied invitation of the defendant. Inasmuch as the defendant does not, in so many words, admit liability, even though these facts were true, although their requests for instructions and the matter contained in their brief, clearly indicate a confession that their liability was a question for the jury, we shall refer the Court to the following authorities:

Wilton vs. Spokane, 73 Wash., 619.

Kaler vs. Puget Sound Bridge and Dredg. Co., 72 Wash., 497-501.

Hoyt vs. Independent Asphalt Paving Co., 52 Wash., 672.

In the Hoyt case, *supra,* the facts are peculiarly applicable to the facts in this case. The paving company had a contract with the city of Seattle for the paving of one of the streets, and during

the progress of the work the contractor laid planks alongside of a car line for use of passengers of an electric company operating cars along the street that was being paved. A passenger alighting from a car, stepped upon the plank, which tipped up, and she fell and was injured. A verdict for plaintiff against the contractor was sustained. The court in passing upon the same question as is raised here, says:

> "There seems to be no reason for the contention that the appellant was not responsible for the condition of the streets. It is not denied that it entered into the contract with the city to do this work, or that the putting down of the plank which was the cause of the injury was the act of the appellant."

See also:

Cox vs. City of Philadelphia, 165 Fed. 559.

The Cox case, supra, cites approvingly the case of Eby vs. Lebanon County (Sup. Ct. of Pennsylvania), 31 Atlantic 332, holding independent contractors of the county liable for their negligence in failing to properly guard a trench they had constructed into which a pedestrian fell and was injured.

BARRIERS.

Defendant seems to take it for granted, as indicated by its vigorous assertion, that the company or the city had placed barriers across this improvised sidewalk for the purpose of warning the

public against its use, and claim the plaintiff and other persons purposely evaded and disobeyed the warning indicated and walked over the planks around the end of the barriers. The record does not bear out any such suggestion. There was substantial evidence tending to show that no barriers had been placed across the walk at all, and never had been. In addition to the evidence heretofore quoted upon this matter, in our statement of the case, we quote from the record, page 31, and from the upper part of page 32, from the testimony of witness Reed, upon cross examination by defendant's counsel as follows:

> "Q. In regard to the barriers at the south end of the bridge, you say as a positive fact that the barrier did not extend across the sidewalk on the south end of the bridge?
>
> A. No, sir, there wasn't anything across the sidewalk that I ever seen, but there was across the bridge, the main bridge. It was across the sidewalk *on the other side, the other side of the south end.*"

(It will be noted that Reed crossed this walk a few minutes before the accident.)

Then there was evidence given by witness Pinkley, heretofore quoted, in our statement of the case, that the barrier which was placed across the *roadway* possibly extended overa few inches, perhaps a foot, over the sidewalk way, and persons using

this walkway would swing around the end, but did not have *to step off the plankway in order to do so.* Then, on the part of the defendant, witness Hooper, street commissioner of the city of Pullman, testified that barriers had been erected. From this the court will readily see that there was a conflict in the evidence as to whether the company had performed its duty and placed a barrier across the end of the improvised sidewalk or whether or not the barrier had not been placed so as to give people notice that the way was barred. This is a court for the correction of errors, and not for the trial of questions of fact, or the weighing of conflicting evidence, as it has so many times announced.

Upon this phase of the case, counsel cite the case of Hunter vs. Montesano, 60 Wash., 489. We have no fault to find with this decision and it is no doubt good law, when there is a showing of facts which make the doctrine applicable. Of course, if, in the case at bar, the evidence conclusively showed that there were barriers across the sidewalk at the place where the accident occurred which prevented people from using the walkway in question, then plaintiff would be guilty of contributory negligence, precluding a recovery. At least, it would be a question for the jury, like all other questions of fact.

DEFECTS IN WALK.

With reference to the planking, witness Reed testified at page 20 of the record, as follows:

> "Those were bridge plank or something. And the other one was laying a little further west from that, an inch and a half or two inches or something like that. That is, it was not always that way, of course, as the planks got loose and thawed out a little like it kind of jumped around. It was on small rock or gravel or loose stuff as would be about a bridge in building that way. There was a crack between two planks. Those planks were supposed to be twelve inches wide, I think, what they call bridge plank. I don't know what else they could be put down for except to walk across, because we could not get across there without there being something there, the way they had it."

Witness Pinkley testified as follows:

> "I was going from town and was using this same path or foot bridge that she was using. To the best of my recollection there were two planks laid parallel with the sidewalk, and the snow had become packed on top of these planks and rounding off a little bit. There was some space between the planks, not very much." (Tr. 34.)

On page 36 of the record he said:

> "There was a well defined trail through there, a path there, because there was a good many people traveling there. The trail ran across these boards. I had to walk on those boards, I know."

Plaintiff testified as follows:

> "It was dark * * * my foot seemed to slip into a hole of some kind, or crack. I had the impression that my foot was going through the bridge, and I fell and broke my ankle and also hurt my back. * * * when I felt my foot go out from under me or slip, or whatever it was my body went over to the left and my foot felt as if it was in a hole in the crack. When I fell I pulled my foot out. When I started to walk across there, there was nothing to indicate at that time that there was any crack between the boards or any hole to fall into. There was snow, lumps of snow on this planking to obscure any crack between the boards or hole to fall into. The path seemed to be lumpy." (Tr. 40.)

On cross examination she testified as follows:

> "Q. I will ask you, Mrs. Branham, whether or not as a fact the cause of this accident was the slippery condition of the walk, in your—
>
> A. No. It was because my foot slipped into a hole or something of that sort, or crack, I could not just exactly describe it. I presume it must have been a hole in the boards because I was walking on the boards, or where the boards should have been. I did not examine it to see. I did not make a thorough examination, but I know my foot slipped into a hole. I never examined it afterwards. Yes, I can say at this time there was actually a hole there in those boards; there was a hole that my foot slipped into of some kind." (Tr. 45-46.)

On re-direct examination, record, page 47, she testified:

> "I could not tell how far my foot went down through this plank; it only, it went far enough so that it gave a twist. I felt the sides of my ankle against something when I twisted it and dropped over."

The court will observe this accident occurred at 6 o'clock P. M. February 4th, 1916, just after dark. The plaintiff had not been down across this bridge before for several years, and the darkness and snow undoubtedly obscured the hole or crack into which she stepped. At least, the jury could so find.

We contend, that it was the duty of the defendant, so far as this walkway was concerned, to construct and maintain the same in a reasonably safe condition considering the use to which it was devoted by reason of the invitation of the company to its use by the public. The defendant must have known that if these planks were loose, that they would move around during the interval that the company had temporarily suspended operations, and the slightest precaution upon its part, if taken, would have placed the planking in such condition as to prevent holes being caused therein by its use while the defendant had charge of it, and while it knew the public was using it as a walkway. We do not contend that the company was under any obligations, in the first instance, to construct a walk for the use of the public at that point. It

could have removed the plank altogether, or never have placed them there. Then the public would have to find some other way to get to town from one portion of the town to the other, but when the company saw fit to construct this plankway for use by pedestrians, it then became its duty to so construct and maintain it during the time it had charge of the bridge, in a reasonably safe condition for such use, and, if it failed to do so, and injury was caused by reason of such failure, it certainly was liable, from any standpoint of justice or right; or it should have erected a barrier for the purpose of preventing people from using the sidewalk. The defendant cannot be heard to say: "We placed these planks here for the use of the public. Still we did not have any notice of the fact that the public was using it, although the whole community knew that at least five hundred people per day passed over the sidewalk in question for a long time prior to the date of the accident, and we were under no obligation to place them in a safe condition or maintain them in a safe condition, or pay any attention to them after they were placed there."

Defendant argues the effect of a claim which was made to the city by plaintiff, which was offered and admitted in evidence. This claim was only

admitted by the court for the purpose of showing any contradiction or inconsistent statements which plaintiff might have made at the time of filing the claim as distinguished from her testimony in this case, and the jury was instructed, as will appear at page 103 of the record, that it was offered and admitted solely for such purpose. Inasmuch as this court is not engaged in weighing evidence, that being the sole province of the jury, we think further argument upon this question is unnecessary.

Counsel in their brief assert that the immediate cause of the injury was the slippery condition of the walk in question, and such being the case, that plaintiff should not be permitted to recover, and cite the case of Stone vs. Boston & Albany R. Co., 41 L. R. A., 794. Counsel no doubt failed to read the case cited, for the same has reference to the intervention of a "human being" between the original cause and the resulting damage. While no doubt familiar with the decisions of the Supreme Court of our state, they have failed to call the court's attention to the case of Wren vs. Seattle, 100 Wash. 74, where a host of cases are collected from numerous jurisdictions, where that court dealing with a question identical with that here presented say:

> "Moreover, even assuming as a fact that the sidewalk was slippery from snow and ice, respondent did not, as a matter of law, assume the risk of a broken board *or crack* in the sidewalk itself sufficient to admit his foot should he slip, nor the risk of injury inherent in the walk itself."

And at page 75 the court say:

> "No court, so far as we are advised, has ever held that the excusable existence of snow and ice, operating merely as a contributing condition in causing an injury by some defect in the walk itself, can be successfully asserted in absolution from liability for injuries caused by such inherent defect."

Furthermore, the court instructed the jury (Tr. 102) that if the sole cause of the injury was the accumulation of the snow and ice that plaintiff could not recover, for the reason that the railway company was not responsible for such accumulation of snow and ice, which is almost identical with Instruction No. 5 (Tr. 95) requested by defendant.

The suggestions here made, should immediately dispose of the claim of defendant in this regard.

INSTRUCTIONS.

Defendant takes exception to an instruction given by the Court, as follows:

> "If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the im-

> pairment of her earning capacity in the *past,* although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you find for the plaintiff."

Defendant argues at length and cites numerous authorities which it claims supports its claim with reference to this instruction. None of the authorities cited sustain defendant's contention, when we consider the evidenee in the case at bar, as distinguished from the evidence in those cases, but we think we can dispose of this assignment of error so as to obviate the necessity of the Court examining the authorities or considering it further. This instruction was given upon the express invitation and request of the defendant, and is in effect and substance identical with Instruction No. 12 (Tr. 98) requested by the defendant, which was as follows:

> "If under the instructions I have given you, you find that the plaintiff is entitled to recovery, then you will allow her such sums as will fairly compensate her for the pecuniary loss which she has suffered by reason of the injury complained of, and in this connection you may take into account her age, habits of life, industry; *the work and character of work performed by her prior to the accident, the work and character of work, if any, which she has performed since the accident;* the pain and suffering, if any, as a result of the injury."

Before the court instructed the jury, as shown at page 93 of the record, defendant requested certain instructions, and the record contains the following:

> "Thereupon, before the court instructed the jury the defendant requested the court to give the following instructions"

and the defendant thereupon requested the court to give the instruction just quoted (Tr. 93), and also requested the court to give Instruction No. 13, as follows:

> "If under the charge of the court you should find for the plaintiff, yet if under the evidence you believe that the plaintiff is able to work and earn money, it is her duty to do so and thereby lessen and avoid so far as she can do so the consequences resulting from the injury complained of, and it is your duty in assessing the damage to diminish the amount thereof to that extent."

These instructions are clearly intended to instruct the jury to compensate the plaintiff for any loss which she has sustained through the impairment of her earning capacity in the *past*, otherwise why consider her "pecuniary loss?" Why would the jury be allowed to take into consideration "her age and habits of life, and industry, the work and character of work performed by her prior to the accident, and the work and character of work, if any, performed by her since the acci-

dent?" Evidently, at the time this instruction was requested by defendant and given by the court, the defendant was under the impression and belief that there was evidence sufficient to show that her earning capacity had been impaired in the past, and we pleaded the loss of earning capacity specially in our complaint (Tr. 6-7); and although we did not prove the exact number of dollars she had lost by reason of her injuries, which would have been speculative, to say the least, and would depend upon a number of things as to just what amount she could have earned. This would not prevent the jury from considering the damages sustained by her by the impairment of her *earning capacity.* The court remarked in giving the instruction that "although I believe that there is no testimony before you as to what her earning capacity was," this was a mere comment by the court on the evidence, and intended to mean that it had not been proven in *dollars and cents.* It will not be construed as meaning, that there was no evidence of any loss sustained in the past by reason of the impairment of plaintiff's earning capacity, and the jury would be just as good a judge as the plaintiff herself as to what she has lost by reason of this impairment, and, while she could testify as to what she could earn prior to the accident, this would be evidence the jury might

consider in determining what she could probably have earned between the time of the accident and the day of trial when she testified. It would not be binding upon the jury. They could consider her age and the class of work she was fitted to perform, and what is usually paid for that class of work, and what her living expenses would ordinarily be, and could arrive at some reasonable conclusion as to her probable loss. No one can testify as to what she would have earned. At best, it would be a mere estimate, on her part, and if she testified that she could have earned $100.00 per day, the jury would not be bound by her testimony. We submit there is sufficient evidence in the record upon which the jury could base a finding of damages for loss sustained through the impairment of her earning capacity in the past.

We quote from the plaintiff's testimony contained in the record as follows:

> "Was engaged in the business of dressmaking at that time and had been engaged in that business for over five years (Tr. 39). I didn't know that I was hurt as badly as I was. My limb felt numb when I started to walk, and I didn't know that my foot was broken. I went to a store and then called for a taxi. I was laid up at the residence of my brother-in-law for about three months, and during that time suffered a great deal of pain from that ankle, very bad pain. I did not sleep very much from my ankle and my back (Tr. 41). The

only way I have of making a living is by dress-making. I have not been able to carry on that business since the accident on account of my back and ankle. If I run the machine three or four days I am laid up a day or so. I have never felt real well since. I was perfectly healthy before this time." (Tr. 42.)

Dr. Pattee testified as follows (Tr. 55):

"If this patient's business had been that of dressmaker, where she had to use that foot constantly on a sewing machine or something of that kind, that would impair her capacity, it would incapacitate her in gaining a liveli-hood because you cannot immobolize any joint without getting some irritation upon use and also some stiffness, to immobolize any joint will cause stiffness, or an ankylosis (Tr. 55). As I told her at the time she would have trouble with it for a couple of years possibly, before that straightened, totally straightened out, as many times it will run over a period of two or three to five years and they will have a weak joint there and have to watch it. In a woman of her age and the occupation that she follows it would inhibit her from that source of livelihood for I think conservatively, could say for two or three years, as she follows the work of millinery and dressmaking. At that time she complained of her back terribly. In the wrench which she gave herself naturally she wrenched her back and the muscles of the back. That was evident. * * * I couldn't state how long that condition would remain. * * * I mean to say that in the ordinary case of a fractured limb, it would be weaker than the other; weaker than it was before very probably for a period of five or six years after the accident." (Tr. 62.)

Dr. Setters testified:

> "I know the plaintiff in this case treated and examined her ankle professionally, some time ago, the first one the 4th of February, 1917. She had a Pott's fracture, which was broken, one broken bone, and a chip off of the other bone, leaving a weakened ankle, and she was then in a neurasthenic condition, which means a general nervous breakdown, which was very marked at that time, decidedly (Tr. 74). Considering that she was forty-one years of age when it happened and considering the recuperative powers of a woman of that age as compared with others, a break of that kind usually involves the joint, and usually leaves a stiffness of the joint through life. I don't think it would ever be repaired as it was before the break. * * * In the examination of the back there was very little found except there was an increased irritability over the spine and also of the nerves below the spine. She had traumatic neurasthenia. * * * A neurasthenic cannot earn money becauses her whole concentration of mind is on themselves." (Tr. 75.)

Therefore, we conclude that there was abundant evidence in the record showing some damages to her on account of her loss of earning capacity, and (2) that if the court committed error in giving the instruction complained of it was invited and requested by defendant, and (3) the instruction is much more favorable to the defendant than it had a right to have given, and does not contain as many elements of damages as was included in the

requested instruction proposed by defendant. The elements of pain and suffering are absent from the instruction given by the court, but are included in the instruction requested by defendant.

THE VERDICT WAS NOT EXCESSIVE.

Considering the injuries sustained by the plaintiff the verdict returned cannot be claimed as being excessive, and if the claimed error as to the instruction heretofore referred to is to be disregarded by this Court, then this Court cannot pass upon the question of excessive verdict, as it has so many times announced, because the question of the excessiveness or inadequacy of a verdict can only be considered by the trial court on Motion for New Trial, and any order made with respect thereto is not an appealable order and cannot be reviewed by this Court.

The last instruction complained of appears at page 101 of the record and is as quoted on page 24 of defendant's brief. The objectionable part of the instruction, according to defendant's brief seems to be the following words: "If you find that the *city* knew that the bridge was to be used by the general public," etc. The word *city* is either a mistake which in some manner has crept into the bill of exceptions, and escaped the notice of

either side, or, if actually given by the court, it was clearly an inadvertence on the part of the court, for by reading the instruction it is apparent that the court clearly intended to use the word "company," instead of the word "city," and this was evidently the understanding which defendant had of the instruction at the time it took its exceptions to the instruction in question, for the reason that the claim now made was not even suggested at the time of the taking of the exceptions, which will be found at page 105 of the record, and in defendant's assignments of error (Tr. 123) referring to this instruction defendant said:

> "The Court erred in instructing the jury as follows:
>
> "If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot-passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances."

The exception taken to the foregoing instruction was in the following language:

> "We except to the instruction given by the court in regard to the construction of the sidewalk by the Defendant Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the portion adjacent thereto referred to in the evidence." (Tr. 124.)

Surely it will not be contended that this exception will admit of the criticism now directed to the instruction in question. The exception simply goes to the proposition that it is erroneous because there is no showing that the defendant constructed the sidewalk. Now they assert it is erroneous because the word "city" is used instead of the word "company." Of course such exceptions will not be considered by the court, as has been so often announced. If the error now claimed had been called to the attention of the trial court by proper exception it would undoubtedly have corrected it.

In conclusion we say that the other requested instructions which were refused, and to which refusal defendant takes exception, were all covered in the instructions given by the court in so far as the same were applicable, and a great many of the requested instructions were wholly erroneous and were properly refused.

We respectfully submit that the judgment should be affirmed.

PLUMMER & LAVIN,

JOHN SALISBURY,

Attorneys for Defendant in Error.

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United States
Circuit Court of Appeals
For The Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. D. BRANHAM,
Defendant in Error.

Upon Writ of Error to the District Court of the United States, for the Eastern District of Washington, Northern Division.

Opening Brief for Plaintiff in Error

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STATEMENT OF THE CASE.

The Oregon-Washington Railroad & Navigation Company, the plaintiff in error, as a part of its railroad system owns and operates a branch line through the City of Pullman, in Whitman County, Washington. In passing through the said City of Pullman, its right of way and tracks cross Kamiakam Street at right angles. Kamiakam Street is one of the principal streets of the city leading from the main part of the

city to one of the residence districts. The Northern Pacific Railway Company's right of way joins the right of way of the Oregon-Washington Railroad & Navigation Company, and the two lines parallel each other in crossing said Kamiakam Street. The Palouse River parallels the Oregon-Washington Railroad & Navigation Company's right of way at the point in question, and Kamiakam Street is carried over the same on a bridge, the end of which comes in close proximity to the right of way of the company.

Some time during the year 1915, the City of Pullman concluded that this Kamiakam Street bridge over the Palouse River was in need of repair, and entered into negotiations with the two railroad companies to provide for the repair of the bridge. These negotiations resulted in a contract between said City of Pullman and the plaintiff in error. (See Plaintiff in Error's Exhibit 5.) Pursuant to the terms of the agreement referred to, the plaintiff in error commenced the repair of said bridge and was prosecuting the same during the winter of 1916. Some time prior to the 4th day of February, 1916, work had ceased upon said bridge on account of the inclemency of the weather and no work had been done on said bridge on the day above referred to; on the 4th day of February, 1916, the defendant in error while attempting to cross said bridge about six o'clock in the evening, slipped and fell and sustained a Pott's fracture of the left leg. That within thirty days thereafter the defendant in error filed a claim against the City of Pullman, setting forth the nature and extent of

her injuries and cause of same. (See Exhibit 2.) Some time thereafter this suit was brought and the City of Pullman was joined as a defendant with the plaintiff in error. Prior to the trial, however, the City of Pullman was dismissed out of the suit on motion of counsel for the defendant in error, and the case went to trial against the plaintiff in error alone.

The verdict of the jury was against the plaintiff in error.

A motion for judgment notwithstanding the verdict was duly considered by the court pursuant to stipulation entered into between counsel for the respective parties, prior to the submission of the case to the jury, and after considering said motion, same was denied. (Record, pg. 16).

The jury returned a verdict against the plaintiff in error in the sum of $3750.00, and judgment was entered thereon.

Motion for new trial was duly interposed and after hearing the same, the motion was denied. (Record, pg. 16).

Judgment was entered in accordance with the verdict in favor of the defendant in error and against the plaintiff in error.

It is to review the proceedings had in said cause and the judgment entered therein, that this writ is prosecuted.

We will discuss the evidence more in detail in connection with the argument upon the various assignments of error.

ASSIGNMENTS OF ERROR.

The following errors specified as relied upon and each of which is asserted in this brief and intended to be argued, are the same as those set out in the Assignments of Errors appearing in the printed record, to-wit:

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant for a non-suit immediately at the conclusion of the introduction of evidence by the plaintiff, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That defendant has not been shown to have been guilty of any negligence or breach of any duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of the plaintiff herself, or by the negligence of some other person or party for which this defendant was not responsible, and not by reason of any negligence on the part of the defendant or any of its employees.

4. That under the contract with the City of Pullman, by which defendant had been performing certain work in connection with the re-construction of the bridge referred to in the complaint of the plaintiff, there was no duty, expressed or implied, on the part of the defendant in connection with the use of

said bridge by the plaintiff, or the public of which the plaintiff was one, and that the defendant was not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to judgment of dismissal upon its motion.

II.

That the court erred in denying defendant's motion for a directed verdict in favor of the defendant immediately at the close of all of the evidence, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That the defendant had not been shown to have been guilty of any breach of duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of plaintiff herself and not by reason of any negligence on the part of the defendant.

4. That under the contract with the City of Pullman by which the defendant had been performing certain work in connection with the re-construction of the bridge referred to in the complaint of the plaintiff there was no duty, expressed or implied, on the part of the defendant in connection with the use of said bridge by which the plaintiff, or the public of which the plaintiff was one, and that defendant was

not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to a verdict on the evidence, by the direction of the Court.

III.

That the Court erred in denying defendant's motion for judgment notwithstanding the verdict (counsel for the respective parties having stipulated that such motion might be made and passed upon by the court), upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant; that if the negligence of any party contributed in any way to the injury of plaintiff, it was not the defendant company, but was the City of Pullman or the contributory negligence of the plaintiff herself.

2. That the evidence showed that the plaintiff was guilty of contributory negligence which was the cause of the injury complained of.

IV.

That the court erred in denying the defendant's motion for new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdict of the jury and that it was against the law.

3. Error in law occuring at the trial and execpted to by the defendant.

V.

That the court erred in giving and refusing the instructions to the jury, in the following particulars:

1. The court erred in refusing to give instruction No. 1, requested by the defendant, as follows:

"Instruction No. 1. I instruct you to return a verdict in this case in favor of the defendant," which refusal was excepted to before the jury retired, as follows: "We except to the refusal of the court to give instruction No. 1 requested by the defendant."

2. The court erred in refusing to give instruction No. 3, requested by the defendant, as follows:

"Instruction No. 3. From the mere fact that an accident happened and plaintiff was injured you are not to infer negligence on the part of the defendant, but the presumption is that the defendant was exercising due care at all times and the burden is upon the plaintiff to overcome this presumption by a preponderance of all of the evidence in the case." To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 3 requested by the defendant."

3. The court erred in refusing to give instruction No. 4, requested by the defendant, as follows:

"Instruction No. 4. I instruct you that the reconstruction and repair of the bridge along Kamiakam Street in the Town of Pullman by the defendant, Oregon-Washington Railroad & Navigation Company, was undertaken by said defendant under and pursuant to a contract in writing entered into between the Town

of Pullman and the defendant, Oregon-Washington Railroad & Navigation Company, by the terms of which the said Town of Pullman expressly agreed to keep the said street and bridge closed during the said period of repair and reconstruction. Therefore, if you find from the evidence that the town of Pullman failed to close the said bridge in accordance with the terms of the contract above referred to and permitted the same to be used by the public during the said period of repair and reconstruction and if you further find from the evidence that by reason of the failure of said town of Pullman to so close the said bridge that plaintiff entered upon the same and while on the same or a part thereof slipped and fell and was injured, then you are instructed that this defendant is not liable therefor and your verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 4 requested by the defendant."

4. The court erred in refusing to give instruction No. 6, requested by the defendant, as follows:

"Instruction No. 6. I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalks on said bridge over and along Kamiakam Street, and you further find that the accident to the plaintiff from which she sustained her injuries com-

plained of was due as much to the slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant.

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 6, requested by the defendant."

5. The court erred in refusing to give instruction No. 7, requested by the defendant, as follows:

"Instruction No. 7. The court instructs you that the plaintiff, Mrs. Branham, was required under the law to use ordinary care in passing over the sidewalks of the Town of Pullman, and the walk on the bridge in question, and if you find from the evidence that the sidewalk of the town of Pullman in question was defective and in a dangerous condition due to the negligence of the defendant at the time and place of the accident, you will next proceed to determine whether plaintiff at said time and place was exercising ordinary care.

By ordinary care is meant the care which an ordinarily prudent person would use in travelling over the sidewalks of the city, and if you find from the evidence that Mrs. Branham at the time and place of the accident was not using ordinary care in travelling over the said sidewalks of the city, as I have defined the meaning of the words, ordinary care, then you must find for the defendant, notwithstanding that you might believe from the evidence that the defend-

ant at the time and place of the accident was negligent in some particular complained of by the plaintiff; provided further you find from the evidence that the want of care of Mrs. Branham in travelling over the sidewalk at the time and place of the accident contributed proximately to her accident and the injury resulting therefrom."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 7, requested by the defendant."

6. The court erred in refusing to give instruction No. 8, requested by the defendant, as follows:

"Instruction No. 8. I instruct you that if either the knowledge of the condition of the sidewalk or the place upon which Mrs. Branham slipped and fell, or the fact that she was wearing at the time improper shoes with which to go upon a walk the condition of which she knew, was the primary cause of the accident, she was guilty of contributory negligence and cannot recover and the verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 8, requested by the defendant."

7. The court erred in refusing to give instruction No. 9, requested by the defendant, as follows:

"Instruction No. 9. I instruct you that when a person knows of a dangerous sidewalk, or a sidewalk in a dangerous condition, the law requires her to exercise such reasonable care as the ordinarily prudent and cautious person would use under like circum-

stances. If this is done and injury results, the person is without fault and if you find this to be the case, then Mrs. Branham was not guilty of contributory negligence. If this were not done and the failure so to do proximately contributed to the injury sustained by Mrs. Branham, then she would be guilty of contributory negligence and could not recover.

The question of whether upon all facts in the case as disclosed by the evidence, Mrs. Branham was or was not guilty of contributory negligence, is one for your determination.

If from the evidence you find that she was guilty of contributory negligence and such negligence on her part was the proximate cause of the injury sustained by her, then you shall find for the defendant."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 9, requested by the defendant."

8. The court erred in refusing to give instruction No. 11, requested by the defendant, as follows:

"Instruction No. 11. I instruct you that the undisputed evidence in this case is to the effect that barriers were placed at the north end of the bridge and sidewalk extending clear across the same.

I further instruct you that the undisputed evidence is that in order to go upon the sidewalk on which plaintiff fell, she was required to pass around the end of the barrier so placed.

I further instruct you that if you find that in so doing she did not exercise ordinary care, as heretofore defined in these instructions, then you will find

her guilty of contributory negligence and your verdict shall be for the defendant. The fact that other persons had travelled the street and taken the risk incident to going upon the walk in the condition in which it was, does not change the rule herein laid down. There are always persons who take risks if a short cut can be made and who will go upon a street even if it is obviously not open to public travel."

To which counsel made the following exception: "We will except to the refusal of the court to give instruction No. 11, requested by the defendant."

9. The court erred in instructing the jury as follows:

"If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway company to make the sidewalk reasonably safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

If you find that the railway company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it

was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she herself was guilty of contributory negligence."

To which defendant excepted as follows: "We except to the instruction given by the court in regard to the construction of the sidewalk by the defendant Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the portion adjacent thereto referred to in the evidence."

10. The court erred in instructing the jury as follows:

"If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you will find for the plaintiff."

To which the defendant excepted as follows: "The defendant excepts to the instruction of the court in regard to the earning capacity of the plaintiff, for the reason that there is no evidence of any kind offered to show what the earning capacity of the plaintiff was and there is nothing for them to claim any damages upon this question of the case."

VI.

The court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

ARGUMENT.

I.

No cause of action was proven against plaintiff in error. (Assignments I, II, III and VI.)

By referring to the contract under which plaintiff in error was repairing the bridge across Kamiakam Street (Ex. 5), the court will note that the City of Pullman as one of the considerations imposed upon it agreed to keep the said bridge closed to traffic during the period of construction. At the time of the accident on February 4th, 1916, and for about two weeks prior thereto, "possibly a little longer" (Record, Pg. 20) the plaintiff in error had not been doing any work thereon. It appears from the testimony of Mr. Reed, a brother-in-law of defendant in error, that this suspension of work was due to "quite a bad spell of weather at the time, snowing and thawing." (Record, Pg. 20). The plaintiff in error, which hereafter we will refer to as the Railroad Company, was under no obligation to protect the public against the dangers incident to the use of said bridge unless the Railroad Company knew that the public was using it and that the City was failing to perform its obligation under the contract referred to. There isn't a

suggestion of any evidence that the Railroad Company had such notice, nor is there any evidence that during the entire period that said work was suspended that the Railroad Company knew anything of the dangerous condition of the said bridge, or that the public was using or attempting to use any part of the temporary structure placed there by the Railroad Company. In fact there was no evidence offered by the plaintiff to show that the planking upon which Mrs. Branham fell, was placed there by the Railroad Company.

It seems to us clearly that under this showing, or rather lack of showing, plaintiff in error should not have been held.

It appears from the evidence that the City of Pullman placed barriers at the end of the bridge and that these barriers were sufficient to give warning to travellers that the same was in an unsafe and dangerous condition.

Mr. Reed, brother-in-law of defendant in error and the first witness called in her behalf, explained how in order to go upon the walk upon which Mrs. Branham fell, it was necessary for one to skirt around the barriers that had been placed there as a warning against the dangerous condition of the walk. (Record, Pg. 30.)

The next witness, Mr. Pinkley, called on behalf of defendant in error, testified as follows:

> "* * * There was a barrier across the right of way at the north end of the bridge, and the top rail of that barrier—I believe there was one

rail, if I remember right, extended from the sidewalk.

Q. And how did pedestrains get up on the sidewalk on the bridge past that barrier?

A. Well, I know how I did. I swung around the barrier on the end." (Record, Pg. 35.)

At this point, when requested to illustrate to the jury, the examination was interrupted by Mr. Plummer of counsel for defendant in error, with the following remark:

"There is no dispute about that, Mr. Hamblen, they all walked around the barrier."

Mrs. Branham testified in substance as follows:

"Assuming that this is a barrier across the north end of the bridge and this is where the people and I went around, and these are the planking here, I presume I had taken three or four steps onto this planking when I fell. * * *

The path seemed lumpy and slick, but after I had passed the boards (barrier) and swung around the boards I thought I was past the dangerous place, but I could not see that before I got to it." (Record, Pg. 40.)

Again Mrs. Branham testified:

"I did observe that the condition was there lumpy, slippery and snowy as I was approaching the bridge. I remember having to catch hold of those planks as I went past them.

(The only planks which Mrs. Branham could have caught hold of was those constituting the barrier at the north end of the bridge.)

"* * * It was slick. It was slippery and icy on the walk and on the boards, and I could feel the condition as I walked. I could not see because it was dark." (Record, Pg. 44.)

Mr. Hooper, Street Commissioner of the City of Pullman, testified as follows:

> "If Mrs. Branham fell within two or three feet of where the barrier was, she would have to step over the barrier there, either do that or move it." (Record, Pg.-----.)

Unless the rule requires the construction of a high board fence with barbed wire entanglements, in order to give the public notice of the existence of a dangerous condition, it would seem that the defendant in error, and any other person who might have attempted to cross the bridge in question, were fully warned of the dangerous condition that existed there. In view of this, we feel that the injury sustained by Mrs. Branham was the result of her own negligence, and her willingness to assume any risk which might result by attempting to go upon a dangerous place of which she had full and sufficient warning.

The Supreme Court of the State of Washington has discussed the law where the warning given by barriers has been disregarded in the case of *Hunter vs. Montesano,* 60 Wash. 489. At page 490 the Court says:

> "It appears not only that Main Street outside of the sidewalk area was properly barricaded, but that respondent saw the barriers, and knew the condition of the street. He said that it was not safe for travel with teams. If it was not safe for teams in the day time, it is obvious that it was dangerous for a footman in the night time. * * * *
>
> Barriers are danger signals. They serve no other purpose. Where a traveller is injured upon

> a street which he knows is closed to travel or being improved, he cannot raise the question of a sufficient barrier. There can, it seems to us, be but one conclusion upon respondent's evidence; that is, that he was guilty of the grossest negligence.
>
> The duty of a city to keep its streets in good repair necessarily carries with it the right to close the street and to suspend travel while repairs and improvements are being made."

This case very fully reviews the decisions upon this question, and we invite the Court's attention particularly to this case. Believing the Court will accept this invitation, we will not refer to the numerous cases discussed in said opinion which in our mind are clearly in point on the issue here raised. We submit that defendant in error should not have been permitted to recover in view of the facts as developed by the testimony referred to.

II.

The motion for new trial should have been granted or the verdict should have been reduced.

The defendant in error in her complaint, paragraph six, alleges special damage in that her occupation was that of a dressmaker, and that as dressmaker she was capable of earning on an average of about $3.00 per day, and that by reason of the injury complained of she was utterly unable to follow such occupation. No evidence of any kind was offered on behalf of Mrs. Branham to show what she was capable of earning, or that in fact she was capable of earning anything.

The court recognized this failure of proof in the instruction given by the court, and which was duly excepted to by the plaintiff in error, as follows:

> "If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict in the event that you find for the plaintiff." (Record, Pg. 103.)

The rule seems to be well established upon this question. The general rule seems to be found in Vol. VIII, Ruling Case Law, at page 663. We quote from Sect. 205:

> "Furthermore it is error to instruct that the jury may award damages for loss of probable earnings or for decreased earning capacity where the evidence does not sustain these elements of damage with reasonable certainty and hence does not furnish any proper basis for allowance."

Duke vs. Railway Company, 12 S. W. 636.

The court there said:

> "When such damages are susceptible of proof as to approximate accuracy and may be measured with some degree of certainty, they should not be left to guess of the jury, even in actions *ex delicto.*"

Stoetzle vs. Swerringen, 70 S. W. 911.

There it is held:

> "There is no distinction between loss of earnings and loss of time caused by a personal injury in respect to the necessity of making proof as to the value of the time lost, if plaintiff recovers for

> that item. It is error to submit an instruction to a jury directing them to award damages for plaintiff's loss of time if they find the issues in his favor, if no testimony as to the value of plaintiff's time was introduced."

See also *W. U. T. Co. vs. Morris,* 83 Fed. 992.

The Court states at page 994:

> "It is a well established rule in cases of this character that where damages are claimed for loss of time incident to an injury or for expenses incurred for medicine and medical treatment or for permanent impairment of health, or loss of capacity to labor, there must be some evidence before the jury tending to show damages of such a character; otherwise an instruction which authorizes a jury to assess such damages is misleading and erroneous, and sufficient cause for a reversal of the judgment, unless it clearly appears that such instruction has in fact done no harm." (Many cases cited.)

See also recent case decided by the Supreme Court of Washington, *Armstrong vs. Spokane & Int. Ry. Co.,* 101 Wn. 525.

We believe a reading of the testimony of Dr. Pattee, whose deposition was taken in the case and who was the physician attending Mrs. Branham at the time of the injury, is conclusive upon the proposition that there was nothing of an unusual nature in the injury received by Mrs. Branham and that the recovery was normal and complete. This was clearly shown by the testimony of the doctors who made an examination at the time of the trial of the case.

Without some special damages being proven, surely a verdict of $3750.00 could not be justified.

III.

Under this sub-division we wish to discuss briefly some errors which we think were committed by the court in regard to the instructions given and refused: (Assignment V.)

Necessarily some of the matters in connection with errors complained of under this assignment, have been discussed in other parts of the brief and we will endeavor not to burden the court with repetitions. By not discussing in detail some of the instructions and refusal to give other instructions, we do not wish to be considered as waiving the errors in connection therewith, but urge upon the court that it consider the same as fully set forth in the assignments of error and as disclosed by the record herein.

In requesting instruction No. 6, which was as follows:

> "I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalks on said bridge over and along Kamiakam Street, and you further find that the accident to the plaintiff from which she sustained her injuries complained of was due as much to the slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant."

We felt we were entitled to this instruction under the issues as made by the pleadings and particularly in view of the negligence alleged in paragraph four of the complaint and which may be summed up in the language of the concluding part of said paragraph, as follows: "that the condition of said temporary and defective sidewalk aforesaid, was such that said defendant railroad company and said defendant City of Pullman had permitted to accumulate upon said planking laid as such temporary and defective sidewalk on said street, quantities of snow and ice, the same having been permitted to accumulate in a rough, uneven, slippery, dangerous and negligent condition upon said planking constituting said sidewalk as aforesaid." This taken in connection with the statement contained in the claim filed by Mrs. Branham against the City of Pullman shortly after the accident happened, and which is Exhibit 2 in the case, and which sets out the cause of the accident in the following language, to-wit: "this injury was caused because of the defective, dangerous and unsafe condition that the street and sidewalk was in at this point on account of planks having been placed along said street at this point on which snow and ice had wrongfully and negligently been permitted to accumulate by the city, and become ridged up on said planks and as a result thereof had become very slippery and when I attempted to walk thereon, not then knowing the true and dangerous condition thereof, I unavoidably fell and sustained the injury above stated"; these allegations taken in connection with the proof offered, par-

ticularly that of Mrs. Branham, who testified that she knew of the slippery and uneven condition of the walk when she was going upon the same (Record, Pg.----), it seems to us that the instruction referred to was a proper instruction. The immediate cause of the injury must have been the slippery condition of the walk, and we believe that the rule laid down in the case of *Stone vs. Boston & Albany R. Co.,* 41 L. R. A. 794, and cases cited there, would control this case. In this case it was held:

> "The rule is very often stated that, in law the proximate and not the remote cause, is to be regarded; and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him."

Many cases are cited in support of this doctrine. It seems to us that this is particularly applicable to this case, for it must appear evident that the immediate and proximate cause of the accident complained of was the snow and ice upon the walk. That there was no duty upon the Railroad Company to keep the walk or planks free from snow and ice, is undisputed throughout the case. This duty, if it rested anywhere, rested upon the City of Pullman.

In excepting to the following instruction, we felt that the same was clearly erroneous, paraticularly that part which we have italicized:

"If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot passengers in the city of Pullman while the work was under construction; or, *if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably safe for that purpose.* Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

If you find that the railway company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she herself was guilty of contributory negligence."

We do not see how knowledge on the part of the city in regard to the use to be made of the sidewalk during the period of reconstruction could be binding upon the Railroad Company. You will notice the court says: "If you find that the *city knew the sidewalk would be used by the general public,* then the duty rested upon the railroad company to make the sidewalk reasonably safe for that purpose."

This assignment of error is found in sub-division nine of Assignment of Error V.

We have discussed at another place in the brief the error complained of under sub-division ten of Assignment of Error V, which has reference to the

instruction of the court given upon the impairment of the earning capacity of defendant in error.

We respectfully submit that the verdict of the jury should have been set aside, and judgment entered in favor of the plaintiff in error. If the plaintiff in error were not entitled to judgment, we contend that it clearly was entitled to an order granting its motion for new trial.

Respectfully submitted,

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